Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977 No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF CALIFORNIA,

Defendant

Report of Alfred A. Arraj,
Special Master

August 20, 1979

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I. INTRODUCTION: PROCEDURAL HISTORY

A. *Prior Proceedings*

The United States of America commenced this action against the State of California in 1945. The ultimate question was and remains whether the right to exploit natural resources which may be found in the submerged lands off the California coast belongs to the United States or California. In 1947 the Supreme Court decreed that such right inheres in the United States as to all submerged lands extending seaward of the ordinary low water mark on the California coast. *United States v. California*, 332 U.S. 804, 805 (1947). *See also United States v. California*, 332 U.S. 19 (1947). Subsequently the Court appointed the late William H. Davis as Special Master in order to delineate the ordinary low water mark along certain disputed segments of the California coast.

Special Master Davis filed his report with the Court in November of 1952, 344 U.S. 872. Before the Court was able to act on that report, however, the Congress of the United States enacted the Submerged Lands Act of 1953 (the Act), 67 Stat. 29, 43 U.S.C. §§ 1301, *et seq.* By virtue of that Act the United States, in effect, quitclaimed to California whatever interest the federal government may have had in and to all lands and natural resources lying three geographic miles[1] seaward of the California coast line. § 3(b)(1) of the Act, 43 U.S.C. § 1311(b)(1). Congress subsequently enacted the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C.§§ 1331, *et seq.*, which declared that

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[1] As used in this report the term "miles" shall refer to geographical miles unless otherwise specified. Precise measurements are not presently at issue. As will be set forth more fully, *infra*, the questions before me concern identification of the "coast line." Once this is accomplished I anticipate that the parties will be able to agree upon the location of the three mile line without resort to litigation. *See* note 4, *infra*.

the United States owned all submerged lands seaward of those lands granted to the states by the Submerged Lands Act. For the time being these statutes settled the dispute and no further action was taken in the lawsuit.

By 1963, however, technology for recovering resources from submerged lands had advanced to the point where it became necessary to refine and precisely delineate the boundary between federal and state submerged lands. The dispute is a question of locating the coast line, from which the three mile boundary is measured. In order to supplement the definitions and guidance provided in the Act, the Supreme Court turned to the provisions contained in the Geneva Convention on the Territorial Sea and the Contiguous Zone (the Geneva Convention), T.I.A.S. No. 5369, 15 U.S.T. 1606 (1958). *United States v. California,* 381 U.S. 139 (1965). Since the latter opinion was issued the Court has entered three decrees, 382 U.S. 448 (1966), 432 U.S. 40 (1977), and 436 U.S. 32 (1978).

B. *Reference to the Special Master*

During the October Term, 1977, the parties filed cross motions for entry of a fourth supplemental decree. The motions frame three issues for resolution at this time. First is the location of the coast line at the Port of San Pedro, east of the eastern end of the Long Beach Breakwater in the mouth of the Port. Second is the location of the coast line at the mouth of San Diego Bay. Third is the location of the coast line at fifteen piers[2] and the Rincon Island complex. The Appendix contains diagrams depicting the

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[2] The Sharp Beach Pier, Morro Strand Pier, the Port Orford Pier, the Ellwood Pier, the Santa Barbara Biltmore Hotel Pier, the Carpenteria Pier, the Venice Pier, the Manhattan Beach Pier, the Hermosa Beach Pier, the Huntington Beach Pier, the Newport Beach Pier, the Balboa Beach Pier, the Oceanside Pier, the Ocean Beach Pier, and the Imperial Beach Pier. Originally the parties included a sixteenth pier, the El Segundo Pier, with this list. That pier has, however, now been physically removed from the California coast and is no longer an issue in this litigation.

disputed areas. These diagrams are for illustrative purposes only, and are not intended to be precise, scaled representations of the areas depicted.

Although the basic governing legal principles are no longer disputed, the motions now before the Court pose certain factual disputes which must be resolved in order to act on the motions. Accordingly, and at the request of both parties, the Court determined to appoint a Special Master for the purpose of taking evidence and making recommendations based on that evidence. The undersigned Special Master was appointed and commissioned on August 10, 1978.

C. *Proceedings before the Special Master*

Counsel attended a prehearing conference in my Denver, Colorado, chambers on September 5, 1978. I then joined counsel for an inspection tour along the California coast on November 7-9, 1978. Discovery proceeded in an orderly fashion without the need for my intervention. I received evidence[3] in New York City, New York, on April 17 and 18, 1979, and in Denver on May 7-9, 1979. Counsel have briefed the evidence and the issues, and the following shall constitute my findings, conclusions, and recommendations to the Supreme Court.

II LEGAL BACKGROUND

The operative provision of the Act is § 3(b)(1), 43 U.S.C. § 1311(b)(1). That section provides as follows:

> The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any

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[3] Counsel presented the direct "testimony" of three expert witnesses in the form of written opinions, Plaintiff's Exhibit 12, Defendant's Exhibit C, and Defendant's Exhibit Y. As to these witnesses the evidentiary hearings were used to introduce the written testimony and any related exhibits, and for cross examination. Because of the technical nature of the testimony involved I found this to be a very satisfactory method of receiving the evidence.

> it has, in and to all said lands, improvements, and natural resources....

"Said lands, improvements, and natural resources" are those set forth in § 3(a)(1), 43 U.S.C. § 1311(a)(1):

> It is hereby determined and declared to be in the public interest that title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters ... be ... recognized, confirmed, established, and vested in and assigned to the respective States....

The term "boundaries" is defined in § 2(b) of the Act, 43 U.S.C. § 1301(b):

> The term "boundaries" includes the seaward boundaries of a State ... but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographic miles into ... the Pacific Ocean....

See also § 4 of the Act, 43 U.S.C. § 1312.

Congress, then, granted the State of California all submerged lands lying three miles seaward of the state's coast line. *United States v. California,* 381 U.S. 139, 148 (1965). As has been amply demonstrated during the proceedings before me the parties have no difficulty drawing a line three miles seaward of the coast line once that line has been established.[4] The disagreement lies in locating the coast line.

The Act defines coast line in § 2(c), 43 U.S.C. § 1301 (c):

> The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with

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[4] The three mile line is drawn by placing a divider or other measuring tool on each point of the coast line and swinging an arc three miles seaward. The line created by the resulting arcs represents the federal-state boundary. *See, e.g.,* testimony of Dr. Robert D. Hodgson, transcript of the Denver hearing at 164; testimony of Professor Eliezer Ereli, Defendant's Exhibit Y at 7; and Plaintiff's Motion. Proposed Decree, and Memorandum at 5, n. 3.

> the open sea and the line marking the seaward limit of inland waters.

There are apparently two distinct low water lines along the California coast, and the Supreme Court has determined that the ordinary *lower* low water line should be used when implementing the definition of coast line. 381 U.S. at 176.

The parties do not dispute the precise location of the ordinary or mean lower low water line. Rather, two of the issues before me, San Diego Bay and the Port of San Pedro, involve locating the line which delimits the seaward limit of those inland water bodies. The third issue, the fifteen piers and Rincon Island, involves the question of whether the coast line follows the mean lower low water line of the piers and Rincon Island or the mean lower low water line of the natural shore.

The statutory definition of coast line provides a starting point for any analysis, but little more. For example, the Act does not define what is meant by the term "inland waters." In order to answer the questions left unresolved by the statute the Supreme Court has turned to the aforementioned Geneva Convention. *See United States v. California,* 381 U.S. 139, 165 (1965), and *United States v. Louisiana,* 394 U.S. 11, 16, 34 (1969). The Geneva Convention sets forth principles and definitions to be used in delimiting a nation's territorial sea. Locating the nation's coast line plays the same key role in determining the boundary of the territorial sea as locating California's coast line does in determining the boundary between California and the United States.[5] Four provisions of the Geneva Convention, in particular, are relevant to the issues presented for my consideration. Article 7(2) defines the term bay, a body of inland water, as follows:

> A Bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger

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[5] The Geneva Convention uses the coast line as a baseline for measuring the breadth of the territorial sea.

than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Article 7(4) describes how to draw the closing line of a bay, or the line demarking the seaward limit of the bay's inland waters:

> If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as inland waters.[6]

Article 3 provides that

> The normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Finally, Article 8 provides that

> For the purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system shall be regarded as forming part of the coast.

With this background of governing legal principles in mind I now turn to an examination of each issue presented by the pleadings.

III THE PORT OF SAN PEDRO

The Supreme Court's 1966 decree defined the inland waters of the Port of San Pedro by using the San Pedro Breakwater, the Middle Breakwater, the Long Beach Breakwater, and straight lines across the two gaps between the three breakwaters as the seaward limits of the Port. 382 U.S. 448, 451. The breakwaters do not, however, enclose the entire port, and the 1966 decree

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[6] Both of the bays in question will involve lines of less than twenty-four miles, regardless of which party prevails.

expressly left undecided the question of where the closing line should be drawn from the eastern terminus of the Long Beach Breakwater. 382 U.S. at 451. The United States would draw the line from the Long Beach Breakwater to the Alamitos Bay Jetty. California would draw the line to the Anaheim Bay East Jetty. *See* National Ocean Survey Chart 18749, Defendant's Exhibit HH. *See also* Appendix Figures 1 and 1a. The parties agree that whichever way the line is drawn the Port of San Pedro is a juridical bay, a port, and a harbor as those terms are used in the Geneva Convention and earlier Supreme Court decisions in this litigation.[7] The only question for resolution is which of the two closing lines correctly delineates the seaward limit of the Port's inland waters under the applicable standards. 382 U.S. at 449.

The fact question may be phrased in a number of ways. Under paragraph 4(b) of the 1966 decree the issue is whether the Alamitos Bay Jetty or the Anaheim Bay East Jetty constitutes the Port's "outermost permanent harbor works." 382 U.S. at 450. *See* note 7, *supra,* for definitions relating to harbor and harbor works. Paragraph 4(d) of the 1966 decree puts the question in terms of where the bay's "entrance" lies. 382 U.S. at 450-51. Under paragraph 5 of the 1966 decree the question is which jetty constitutes the "outermost extension" of the Port's "headlands." 382 U.S. at 451. Article 8 of the Geneva Convention poses the same question as paragraph 4(b), which jetty constitutes the Port's outermost permanent harbor work. Finally, Article 7(4) of the Geneva Convention tracks paragraph 4(d) by posing the issue of what constitutes the bay's natural entrance points. While each of the five statements of the issue provides a framework in which to approach the task at hand, I think it important to continually remember the broader framework of the case — the goal is to

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[7] The following definitions apply throughout this report. A port is any place where passengers or cargo may be transferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe anchorage and sheltering for boats from weather conditions prevailing on the open sea. *See, e.g.,* testimony of William J. Herron and Dr. J. Richard Weggel, transcript of the Denver hearing at 253-56, 406-08, and 410. *See also* Shalowitz, *Shore and Sea Boundaries,* Vol. 1 (1962), at 291. Harbor works and systems are the structures incident to the harbor, such as navigational jetties, protective breakwaters, and piers for accessing vessels. *See United States v. Louisiana,* 394 U.S. 11, 36-37 (1969).

determine where the Port's inland waters stop and the open sea begins.

The United States arrived at its proposed closing line by resort to what it calls the "shortest distance test."[8] Quite simply, the federal government would draw the closing line by drawing the shortest possible line from the eastern terminus of the Long Beach Breakwater to the shore. Using a computer, the Geographer of the Department of State determined that the line to the Alamitos Bay Jetty was the shortest possible line. Although this method is remarkable for its simplicity, it completely ignores the framework which the 1966 decree provides for approaching the issue, as discussed in the previous paragraph. That decree is the law of this case and is binding on both the parties and myself. With all due respect to the Department of State, I must approach the issue from the frame of reference created by the earlier decree, and not from the context of a "shortest distance test" which has not been sanctioned in earlier Supreme Court decisions.

Viewing the issue in the framework of paragraphs 4 and 5 of the 1966 decree, I find that the gap between the Anaheim Bay Jetties and the Long Beach Breakwater constitutes an entrance to the Port of San Pedro. Paragraph 4(d) of the 1966 decree, 382 U.S. at 450-451. The San Pedro Bay is not one isolated harbor or bay which happens to contain facilities for loading and off-loading ships. Rather, the Bay contains the entire Los Angeles area port system. This includes the Anaheim Bay facilities at Seal Beach, the Seal Beach Municipal Pier, the San Gabriel River mouth, the Long Beach Marina and Marine Stadium at Alamitos Bay, Belmont Shore, the Belmont Pier, extensive mooring[9] facilities in San Pedro Bay proper, Long Beach, the Queensway Bay and

[8] Both parties agree that the so-called "bisector of the angle test," *see* paragraph 5 of the 1966 decree, 382 U.S. 451, cannot be used on San Pedro Bay because of the particular geographic features involved. The United States thus turned to the "forty-five degree test," which also cannot be used on San Pedro Bay, and the "shortest distance test." *See* testimony of Dr. Robert D. Hodgson, transcript of the Denver hearing at 117-19.

[9] Mooring is tying a ship to a pre-existing anchorage system, thus obviating the need to use the vessel's own anchor. Berthing, by contrast, is tying to a wharf, pier, dock, or other structure. *See* testimony of William J. Herron, transcript of the Denver hearing at 312-13.

Flood Control Channel at Long Beach, the extensive federal facilities at Terminal Island,and the very extensive port facilities at Los Angeles, Wilmington, and the City of San Pedro. *See, e.g.* National Ocean Survey Chart 18749, Defendant's Exhibit HH, for an aerial "view" of the Port. There are two other entrances to the Port, created by navigational channels in the breakwaters, which appear to handle the major volume of commercial shipping into and out of Los Angeles. *See 7 United States Coast Pilot,* Plaintiff's Exhibit 17, 126-35. This fact does not, however, preclude the existence of a third entrance between the eastern end of the Long Beach Breakwater and the Anaheim Bay Jetties.

The integrated nature of the Port of San Pedro is amply demonstrated by the United States Navy's facilities within the bay area. The Navy maintains two compounds within the Port which are used, together, to service ships stationed in the vicinity of southern California. When a ship containing ammunition is due for service or repairs it moors in one of the two restricted "explosive anchorage" areas. One is located inside Anaheim Bay; the other is located in San Pedro Bay proper, due north of the Long Beach Breakwater. *See* National Ocean Survey Chart 18749, Defendant's Exhibit HH. Barges from the Naval Weapons Station in Anaheim Bay off-load the ammunition for storage in the Weapons Station, and the ship then proceeds to the Naval Shipyard at Terminal Island for the necessary work. The procedure is reversed at the conclusion of repairs. Naval vessels are processed into or out of the Port in this manner on the average of one per day. Both the shipyard and the weapons station function under a common chain of command. *See* Defendant's Exhibit R. Although the Navy need not distinguish between inland waters and the territorial sea in order to service its vessels, it is clear that the service system contemplates that the area from Anaheim Bay westward is one unified harbor system. The Anaheim Bay Jetties thus constitute the outermost permanent harbor works within the meaning of paragraph 4(b) of the 1966 decree, 382 U.S. at 450. *See also* note 7, *supra.*

Implicit in the Supreme Court decrees and Geneva Convention is the principle that closing lines across river mouths, ports, bays, and other bodies of inland water shall be straight. *See, e.g.,* paragraphs 4 and 5 of the 1966 decree, 382 U.S. at 450-51, Articles

7(4) and 13 of the Geneva Convention, and paragraph 1(a) of the 1977 decree, 432 U.S. 40. I recognize that the closing line across the Port of San Pedro will not be straight whichever way the line is drawn. That result is impossible to achieve because, on the one hand, the previously decreed closing line at the western end of the Port follows the breakwaters, which are not straight, and on the other hand, even the Anaheim Bay East Jetty will require a slight angle off of the breakwater. A line drawn to the Anaheim Bay East Jetty will, however, most closely approximate the ideal straight closing line. If one stands back and views the Port in context of the coast's natural curvature to each side of the bay, California's proposed closing line more closely "fits" these curvatures than does the closing line proposed by the United States. A boundary line which tracks a coast line will never, of course, be entirely straight or regular. The straight line requirement is intended, nevertheless, to eliminate such articifical boundaries as proposed by the United States.

Thus far I have conducted my analysis by following the dictates found in *United States v. Louisiana,* 394 U.S. 11, 17-35 (1969). That is to say, I have confined my consideration to an analysis of the physical and factual characteristics of the Port of San Pedro in light of the definitions and guidance found in the Act and the Geneva Convention. I have not considered the delineation of inland waters used by the United States for navigation purposes. *See United States v. Louisiana,* 394 U.S. at 17-19. Although the Supreme Court has held that lines delineating inland waters for navigation purposes are not to be taken as representing closing lines for purposes of the Submerged Lands Act and the Geneva Convention, 394 U.S. at 35, I nevertheless find that the federal government's inland water navigation lines do shed some light on the questions of what constitutes the entrance to and the outermost permanent harbor works of the Port of San Pedro. Because this may appear to be a departure from the Supreme Court's opinion in *United States v. Louisiana,* 394 U.S. at 17-35, I will set forth my two reasons for considering these navigation lines before actually doing so.

In the first place, the law has undergone dramatic changes since the Supreme Court issued the *Louisiana* opinion in 1969. Historically the United States has operated with two different

systems of navigation rules. Domestic law provided one set of regulations governing navigation on "American waters," and international law provided another set for the "high seas." *See, e.g., United States v. Louisiana,* 394 U.S. at 17-19, and Discussion of Regulations, 42 Fed. Reg. 35782-84 (1977). In November of 1976, however, the United States deposited its instrument of accession to the Convention on the International Regulations for Preventing Collisions at Sea, T.I.A.S. No. 8578, 28 U.S.T. 3459, effective July 15, 1977 (the London Convention). The Congress authorized the President to proclaim the London Convention, repealed earlier legislation dealing with international navigational rules (because the new regulations represent a significant departure from earlier law), and implemented the treaty in the International Navigational Rules Act of 1977, 91 Stat. 308, 33 U.S.C. §§ 1601, *et seq.* Pursuant to Rules 1(a) and 1(b) of the London Convention the United States may no longer enforce its inland waters navigation rules as against ships on the territorial sea. *See* discussion of Regulations, 42 Fed. Reg. 35782, column 2 (1977). The lines the United States has drawn on its official navigation charts to separate waters subject to the new international regulations from waters subject to domestic rules and regulations may not, accordingly, be located seaward of the closing line separating Geneva Convention inland water from the territorial sea. In fact, these lines will err in favor of placing some Geneva Convention inland water under the international navigation regulations because the Coast Guard chose to use "physical objects readily discernible to the mariner by eye, rather than by instrument" as end points of the navigation lines. 42 Fed. Reg. at 35783.

In the second place, the limited purpose for which I am turning to the navigation lines does not violate the dictates of *United States v. Louisiana,* 394 U.S. at 17-35, even as the law existed in 1969. Pursuant to the *Louisiana* opinion, I have first turned to the Geneva Convention and earlier decrees in this case. That treaty and the earlier decrees suggest that I look for the entrance to and the outermost permanent harbor works of the Port. With that in mind I have discussed the physical facilities and layout within the Port of San Pedro, the actual use of those facilities by the United States Navy, and the natural geographic contours of the

California coast to either side of the Port. Based on that discussion I have found that the Anaheim Bay Jetties constitute the outermost permanent harbor works and that the gap between those jetties and the Long Beach Breakwater constitutes an entrance to the Port of San Pedro. The inland water navigation lines simply provide one additional source of evidence shedding light on what constitute the entrance and the outermost permanent harbor works as those terms are used in the Geneva Convention. With that limited purpose in mind I turn to examine the inland water navigation lines.

The lines separating inland waters for navigation purposes from waters on which the London Convention controls are known as "COLREGS Demarcation Lines." These lines were first promulgated in 42 Fed. Reg. 35782, *et seq.* (1977), and are now found in 33 C.F.R., Part 82 (1978). More specifically, 33 C.F.R. § 82.1135(a) establishes a line from the seaward tip of the Anaheim Bay East jetty to the seaward tip of the Anaheim Bay West jetty to the eastern tip of the Long Beach Breakwater. *See 7 United States Coast Pilot,* Plaintiff's Exhibit 17, at 27. This line is plainly marked on National Ocean Survey Chart 18749, Defendant's Exhibit HH. *See also* Note A on that chart. The plaintiff in this action has thus formally recognized that the gap between the Long Beach Breakwater and the Anaheim Bay Jetties constitutes an entrance to the Port of San Pedro, and that the waters landward of a line drawn across that gap are not part of the territorial sea.

Because the United States argues so strenuously that the COLREGS lines should not be considered, I want to stress that I have reached my findings as to the Port of San Pedro without regard to those lines. I have considered the COLREGS lines only as supplemental evidence which supports my findings.

The above discussions and resolution leave one last problem for consideration. California would draw the closing line to the Anaheim Bay East Jetty. The COLREGS Demarcation Line is drawn to the Anaheim Bay West Jetty, and then across the channel to the East Jetty. As previously indicated, Anaheim Bay is itself a part of the harbor system. In order to include the Bay within the inland waters the closing line must be drawn to the East

Jetty. The East Jetty is seaward of the West Jetty, and is thus "outermost." A navigation light is mounted at the seaward end of the East Jetty. Additionally, the straight line requirement would be violated by drawing a line to the West Jetty and then turning to meet the East Jetty. Accordingly, I find that the entrance to the Port of San Pedro is the gap between the Long Beach Breakwater and the Anaheim Bay East Jetty, and that the East Jetty constitutes the outermost permanent harbor work within the meaning of paragraph 4 of the 1966 decree, 382 U.S. at 450-51.

Pursuant to the foregoing I recommend that the closing line delineating the seaward limit of the inland waters of the Port of San Pedro be drawn from the mean lower low water line at the southeastern corner of the Long Beach Breakwater to the mean lower low water line of the seaward, southern-most tip of the Anaheim Bay East Jetty.

IV SAN DIEGO BAY

The Court's 1977 decree established that the mean lower low water line along the eastern, seaward edge of the Zuniga Jetty,[10] to and including the southern, seaward tip of the Jetty, is part of the California coast line. 432 U.S. 40, 42. The Court did not, however, establish the closing line westward from the Jetty across the mouth of San Diego Bay. California would draw the line from the southern, seaward tip of the Jetty to the seaward-most tip of Point Loma. *See* National Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL, respectively. *See also* Appendix Figure 2. The United States would draw the line farther north, or inland of the line proposed by California.

As with the Port of San Pedro, both sides agree that, whichever

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[10] A jetty is a structure which fixes the location and protects the mouth of a navigation entrance, such as a river mouth or harbor entrance. Jetties are ordinarily designed to dissipate wave energy and thus provide acceptable currents for the vessels which must navigate the channel. *See* testimony of William J. Herron, transcript of the Denver hearing at 254. *See also* Plaintiff's Exhibit 15.

line is used, San Diego Bay is a juridical bay and the twenty-four mile closing line test is satisfied. Similarly, there is no dispute that San Diego Bay is both a port and a harbor. *See* note 7, *supra*. Consequently, the only question for resolution is the correct location of the line delineating the seaward limit of the Bay's inland waters. 382 U.S. 448, 449. Again, as with the Port of San Pedro, there are a number of ways of phrasing the question. Under paragraph 4(b) of the 1966 decree the issue is what constitutes the port's "outermost permanent harbor works." 382 U.S. at 450. *See* note 7, *supra*. Paragraph 4(d) of the 1966 decree puts the issue in terms of where the bay's "entrance" lies. 382 U.S. at 450-51. Under paragraph 5 of the 1966 decree the question is what constitutes the "outermost extension" of the bay's "headlands." 382 U.S. at 451.

Before proceeding to analyze the issue I think it may be helpful to explain the United States' position in greater detail. The federal government concedes that the seaward edges of Point Loma and the Zuniga Jetty are both points on the California coast line. Using the arc system for delineating the territorial sea, *see* note 4, *supra*, and ignoring any potential closing line between Point Loma and the Juniga Jetty for the moment, the territorial sea edge and the California-United States boundary would appear as depicted by the solid line in Illustration 1. If the line proposed by

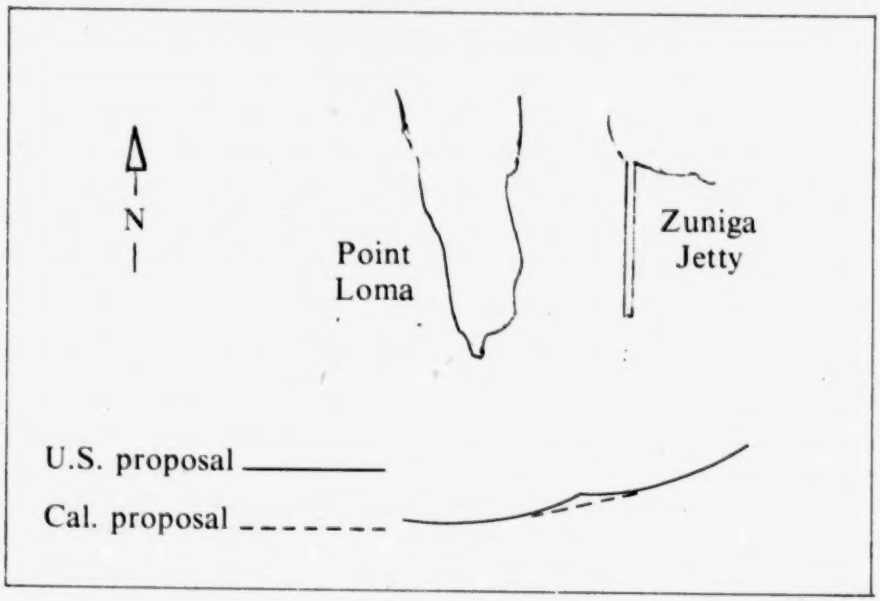

Illustration 1

California were constructed as the closing line of San Diego Bay, then the federal-state boundary will be pushed seaward to the dotted line depicted in Illustration 1. The United States contends that the San Diego Bay closing line should be drawn far enough to the north so as to avoid disturbing the solid boundary line created by the intersecting arcs. *See* Motion, Proposed Decree and Memorandum on Behalf of the United States, at 5 n. 3.

On closer examination I find that the United States' argument assumes the answer to the very question posed. The federal government can only achieve the three mile line it desires by assuming the closing line of San Diego Bay is as the United States contends it should be. Once the federal-state boundary is established in this manner, the United States complains that placing the closing line of San Diego Bay in the position advanced by California disturbs the three mile line already drawn. This approaches the issue entirely backwards. The first question to be decided is where the coast line — that is, the closing line of San Diego Bay — is located. The three mile test is applied to delineate the federal-state boundary line after, and only after, the coast line has been located. I shall proceed on that basis.

I find that the peninsula of land known as Point Loma constitutes the western outermost extension of San Diego Bay's headlands within the meaning of paragraph 5 of the 1966 decree, 382 U.S. at 451. This is a natural land formation which provides shelter for the channel leading into San Diego Bay proper, immediately to the east. Because of its height the peninsula is highly visible to approaching vessels. A seventy foot tower at the southern end of the Point was constructed for navigation purposes, and contains a light, radio beam, fog signal, and radio calibration station. Other highly visible structures atop the peninsula are navigation landmarks for ships entering the bay. *See 7 United States Coast Pilot*, Plaintiff's Exhibit 17, at 118. The National Ocean Survey Charts depict a navigation channel into San Diego Bay immediately to the east of the peninsula. National Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL. The mean lower low water line at the southern, seaward edge of Point Loma should, accordingly, be used as the western endpoint of the closing line. The real dispute involves the eastern endpoint of the line somewhere along Zuniga

Jetty or at Zuniga Point, where the Jetty connects with the land.

Dr. Robert D. Hodgson, Geographer of the Department of State, was primarily responsible for explaining the United States' position during the Denver hearings, and for drawing the National Ocean Survey Charts referred to in this report. According to his testimony the federal government's position hinges, in large part, on the accuracy of National Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL. Those charts depict the Zuniga Jetty as a submerged structure.[11] Commencing on the land at Zuniga Point and proceeding seaward along the Jetty, Dr. Hodgson agrees that the Jetty constitutes a permanent harbor work up to the point where the structure is first submerged. Dr. Hodgson, who had not seen the structure first hand, would use this point of submersion as the outermost permanent harbor work and the eastern endpoint of the entrance to San Diego Bay. *See* Transcript of the Denver hearing at 160-63. Dr. Hodgson was very forthright in his testimony as to two particular matters. First, if the Zuniga Jetty were not submerged, or even only twenty-five percent submerged, he would concede that California's position is correct. The more continuous the Jetty, the stronger California's position becomes. Second, the Geographer testified that if the National Ocean Survey Charts are incorrect, then the actual physical situation should prevail.

Taking the testimony of Dr. Hodgson as representing the position of the United States, it is evident that there is a good deal of agreement between the two parties. Up to the point where the Jetty may become submerged, or where the portion of the structure which is above water becomes discontinuous, there is no dispute that the structure constitutes a permanent harbor work[12] which protects the entrance to San Diego Bay. This follows not only from the Jetty's structural function of providing a safe, relatively wave-free channel leading into the harbor area, but also from the presence of five navigation lights or beacons and a navigation horn on the Jetty. The closing line for San Diego Bay

[11] Submerged means entirely below mean lower low water. *See* testimony of Dr. Robert D. Hodgson, transcript of the Denver hearing at 158-59.

[12] There is no question that a jetty can be a permanent harbor work. *United States v. Louisiana,* 394 U.S. 11 at 50 n. 64.

may be drawn, at the very least, from the point of submersion or aerial discontinuity to Point Loma.

California argues that the navigation charts are incorrect and that the Jetty is in fact a continuous above-water structure to its seaward-most point opposite Point Loma. The Jetty is one of the earliest navigational structures built along the southern California coast. Completed in 1903, its original Congressionally approved design height was twelve feet above the water line. The current height does not approach twelve feet along most of the structure. In 1963 or 1964 the Army Corps of Engineers recommended restoring the Jetty to this original design height. Although this was not done, five mounds of rock were added to support five navigation lights which are depicted on the National Ocean Survey Charts.

Defendant's Exhibit II, Picture 2, is a series of photographs pasted together to depict the entire length of the Zuniga Jetty. The photographs were taken from Point Loma last January at a time when the tide was one foot above mean lower low water. *See* Defendant's Exhibit JJ. There appear to be two spots where the Jetty's apex does not rise above this higher than low water level. Both spots are "blown-up" beneath Picture 2. The smaller of the two enlarged photographs, depicting the area between lights 3 and 4,[13] shows waves breaking over the apex of the Jetty. Similarly, there also appear to be waves breaking over the apex of the jetty in the area between lights 4 and 5. The Army Corps of Engineers constructed a profile or elevation diagram of the Jetty, which is mounted on the upper right hand corner of Exhibit II. This profile corresponds with both Picture 2 on the exhibit and my own memory of the Jetty from our inspection trip last fall. From this profile I find that the area between lights 3 and 4 is not submerged at mean lower low water, although the crown of the Jetty does dip very close to mean lower low water just seaward of light three. Most, but not all of the Jetty is very slightly submerged between lights 4 and 5.

The United States contends that the submerged portion of the Jetty is navigable. I find this is not so, regardless of the definition

[13] The five lights are numbered from one to five beginning with the light closest to shore. *See* the Army Corps of Engineers Zuniga Jetty Profile, mounted at the upper right hand corner of Defendant's Exhibit II.

of navigable waters which one chooses to adopt. The evidence is unrefuted that there have been numerous small boating accidents, including two fatalities, resulting from attempts to navigate over the so-called submerged jetty.

I find that the Jetty is not submerged at any point landward of light 4, and that the jetty is only partially and very slightly submerged between lights 4 and 5. The rock base at light 5 on the southern end of the Jetty is not submerged, and the apex of the Jetty for ten to twenty yards shoreward of light 5 is also not submerged. The portion of the Jetty which is slightly submerged constitutes less than one-fifth of the Jetty's entire length; even though submerged, this portion of the Jetty is not navigable. National Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL, are incorrect. I find that the unsubmerged portion of the Jetty is continuous from the land seaward through light 4. I find that the entire length of the Jetty constitutes a harbor work and that the seaward tip of the Jetty constitutes the outermost permanent harbor work within the meaning of paragraph 4(b) of the 1966 decree, 382 U.S. at 450. The line from the seaward tip of this Jetty to the seaward tip of Point Loma is the entrance to San Diego Bay within the meaning of paragraph 4(d) of the 1966 decree, 382 U.S. at 450-51.

As with the Port of San Pedro, my conclusions as to San Diego Bay are supported by the federal government's COLREGS Demarcation Line system. *See* Part III of this report, *supra* at 10-12. The Demarcation Line separating inland waters from international waters for navigation purposes is drawn from the southern part of Point Loma to the seaward most light on the Zuniga Jetty.[14] *See* 33 C.F.R. § 82.1110 (1978) and *7 United States Coast Pilot*, Plaintiff's Exhibit 17, at 118. *See also* National

[14] The western end of this line is actually at the navigation tower slightly landward of the mean lower low water line. *See* National Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL. As previously indicated, this is because the Coast Guard used physical objects visible to the eye without resort to instrumentation, such as the navigation tower, as endpoints of the COLREGS lines. 42 Fed. Reg. at 35783. That physical location problem does not exist for those locating the federal-state boundary, and both the statutes and the law of the case mandate using the mean lower low water line as the reference point for the closing line. *See* paragraph 2(a) of the 1966 decree, 382 U.S. at 449.

Ocean Survey Charts 18772 and 18773, Plaintiff's Exhibit 20 and Defendant's Exhibit LL. I again stress that I cite the COLREGS lines only as supplemental evidence supporting my conclusions concerning the Zuninga Jetty. *See* pp. 10-12, *supra.*

Finally, I think my findings are supported by the 1977 supplemental decree in this lawsuit, 432 U.S. 40, 42. In that decree the Court specifically established the mean lower low water line at the southern, seaward end of the Jetty as a point on the California coast line. I fail to see the logic underlying the United States' position, which would run the coast line along the eastern edge of the Jetty to the seaward tip, turn around, and then run the coast line back along the Jetty towards the shore.

Pursuant to the foregoing I recommend that the closing line delineating the seaward limit of the inland waters of San Diego Bay be drawn from the mean lower low water line on the southern, seaward-most tip of the Zuniga Jetty, seaward of light 5, to the mean lower low water line on the southern, seaward-most end of Point Loma.

V THE PIERS AND RINCON ISLAND

A. *The Problem*

The third issue presented for my consideration has a different flavor than the problem of the Port and Bay closing lines already discussed. The question presented by the fifteen piers and Rincon Island, *see* Appendix, Figures 3-18, is whether the California coast line follows the mean lower low water line along the natural shore, or whether the coast line follows fifteen manmade piers and the Rincon Island complex protruding into the sea from the natural shore.[15] I shall proceed in this part of my report by setting out a factual description of the piers and island in subpart B, *infra,* and then turning to a discussion of the structures in light of

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[15] Under the Geneva Convention a synonymous way of phrasing the issue is whether or not the seaward edges of the structures in question should be used as basepoints for delimiting the territorial sea.

the controlling legal principles in subpart C, *infra*.

B. *Description of the Structures*

The following descriptions are based on my visual observations during the November inspection tour and evidence offered at the Denver hearing. *See also* Defendant's Exhibit I, a blue looseleaf binder containing photographs and schematic diagrams of the various sites described.

1. *Rincon Island and the Punta Gorda "Causeway," (Appendix Figure 9).* Rincon Island is an artificial island off the shore near Punta Gorda, Ventura County. *See* National Ocean Survey Chart 18720, Defendant's Exhibit CC. The island is built up from the ocean floor with large concrete tetrapods.[16] The surface of the island is rock and dirt fill. The island complex is privately owned, by the Atlantic Richfield Company, and access is restricted. There are many buildings and other structures on the island, all related to an active oil well maintained by the owner. These buildings include maintenance facilities, office space, and temporary housing for employees. There is vegetation growing on the island. There is a large dock on the seaward side of the island with substantial hardware, including cleats, wenches, and cranes, for the berthing of vessels. The dock is used to service other, offshore, oil facilities owned or operated by Atlantic Richfield.

Rincon Island is permanently connected to the mainland by a structure commonly known and identified on road maps as the Punta Gorda "Causeway." Oil is pumped to shore in a pipeline running underneath and alongside the structure. The "causeway" itself is made of a wooden deck and rail resting on a steel frame and pilings. The pilings are filled with gravel and capped with concrete. Water flows freely underneath the deck, but any attempts at subnavigation would be extremely hazardous. Traffic lights at each end of the half-mile facility control the flow of traffic onto and off of the island. The structure, the island, and the dock are regularly used by Atlantic Richfield employees. Neither the structure nor the island have had any noticeable effect on the shore line, and the complex is not a coast protective work.

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[16] These blocks resemble giant-sized versions of the child's "jacks." *See* testimony of William J. Herron, transcript of the Denver hearing at 278.

A controversey developed at the Denver hearing over the question concerning whether the structure connecting the island with the mainland is a "pier" or a "causeway." My recommendation will be based on factors other than a resolution of that factual dispute; I will not, accordingly, resolve the issue.

2. *The Fifteen Piers (Appendix, Figures 3-8, 10-18*[17].) The fifteen piers have an asphalt, wood, or concrete deck surface mounted on pre-cast concrete, steel, or wood pilings. They vary in length from 500 (Santa Barbara Biltmore Hotel) to 3,500 (Ocean Beach) feet. All are permanently attached to the mainland. Water flows freely underneath all of the piers, but any attempt at subnavigation would be extremely hazardous. The piers have no visible effect on the shore line and they are not coast protective works.

Carpenteria, Ellwood, Morro Strand, and the Santa Barbara Biltmore Hotel Piers are privately owned. The Biltmore Hotel Pier is owned by the hotel and access to the general public is forbidden. Carpenteria, Ellwood, and Morro Strand are owned by oil companies and access to the general public is also forbidden. These three oil company piers are currently used by their owners for access to vessels which are used to supply offshore oil rigs.

The remaining eleven piers are publicly owned. The Port Orford Pier, built by Santa Barbara County and operated by the California State Department of Parks and Recreation, is used both as a port facility and for general recreational purposes. The remaining publicly owned piers are not used as port facilities, but they are open to free public access for recreational purposes. Most of these piers are lighted and many contain public restrooms, fish and tackle shops, small snack bars or restaurants, and other concession stands. The Venice Pier has a lifeguard stand.

C. *Discussion*

1. *Outline of the Governing Law.* Once again, the question is

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[17] The original moving papers sought a recommendation as to the El Segundo Pier. That pier has since been removed from the coast and is no longer at issue. *See* note 2, *supra.*

where the coast line is located in the vicinity of these fifteen piers and the Rincon Island complex. The term coast line is defined in § 2(c) of the Act, 43 U.S.C. § 1301(c):

> The term "coast line" means the line of [mean lower] low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

See also paragraph 2(a) of the 1966 decree, 382 U.S. 448, 449. The definition does not, however, address the problem at hand. The statute does not define the term "coast" and there is no indication in the Act as to whether the term was intended to encompass only the natural shore or the natural shore as modified by manmade structures protruding into the open sea.

Two paragraphs in the 1965 opinion in this case, dealing with artificial extensions of the land, may provide some guidance:

> When this case was before the Special Master [Mr. Davis], the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since enclosed or reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. Furthermore, the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and the effect of any future changes could thus be the subject of agreement between the parties.
>
> Arguments based on the inequity to the United States by allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

381 U.S. at 176-77. This text was incorporated into paragraph 2 of the 1966 decree, 382 U.S. at 449:

> The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the [Geneva Convention].

Turning to the Geneva Convention,[18] *United States v. California,* 381 U.S. 139, 165 (1965), and *United States v. Louisiana,* 394 U.S. 11, 16, 34 (1969), the parties have rested their arguments on two provisions, Articles 3 and 8. Article 8 is paraphrased in the second clause of paragraph 2 of the 1966 decree, just quoted:

> The outermost permanent harbour works which form an integral part of the harbor system shall be regarded as forming a part of the coast.

Article 3 provides that

> The normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Perhaps Mr. Lauterpacht, *see* note 18, *supra,* summarized the state of the law, domestic as well as international, best when he said:

> Nothing is inserted in the Convention on the Territorial Sea ....In short, the basic approach of the treaties has been to regulate the problems which arise from the presence of natural features off the coast or from the need to separate

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[18] At the New York City hearing I had the privilege of listening to two of the world's foremost international legal scholars discuss the history of the law of the sea leading up to and following the Geneva Convention. The Hon. Philip C. Jessup, formerly a Judge of the International Court of Justice at the Hague and a distinguished professor and practitioner of international law, testified for the State of California. Mr. Elihu Lauterpacht, Queen's Counsel, also a distinguished professor and practitioner of international law, testified for the United States of America. Although neither witness was able to reach a clear-cut, definitive conclusion, I have found the work of both to be most helpful in providing me with a background and framework in which to work. When citing to the testimony of one in this report I intend no disrespect to the other.

> internal from territorial waters. The effect of man-made structures has not been the subject of special provision in the codifying treaties, and only rarely of specific discussions by the authors. It is evident, therefore, that in the present case we are dealing with a highly exceptional problem....

Plaintiff's Exhibit 12, at 17.

2. *The Discontinuous Low Water Line.* If one were to take a giant carving knife and make a horizontal slice just above the line of mean lower low water, the resulting aerial view of a pier would appear as a series of parallel circles protruding into the sea. This series of small circles, which represent the pilings supporting the pier deck, create what the United States labels a discontinuous low water line. The United States contends that this lack of a continuous low water line precludes any use of the piers as part of the coast line. California, however, points out that jetties, breakwaters, and even sand beaches do not have a continuous low water line, either,[19] yet the Supreme Court has decreed such structures to be a part of the coastline.

I find that the discontinuous nature of the low water line does not affect whether or not the structure is to be considered a part of the coast. If the structure is part of the coast, then the perimeter of the structure, as delineated by a series of lines drawn tangent to, and connecting, the outer edges of the pilings, constitutes the coast line. The discontinuous nature of the structure goes only to the effect the structure will have on accretions, relictions, wave energy, littoral sand movement, and the like. An open pile structure such as a pier, which is 90 to 98 percent void, will ideally have no effect on wave energy or accretion, whereas a more solid structure such as the Long Beach Breakwater, 40 to 45 percent void, will dissipate wave energy. The continuity or discontinuity of the water line is an engineering characteristic which affects only whether or not the structure is a coast protective work.

3. *Discussion — Article 3.* As previously indicated, Article 3 of

[19] In the case of a breakwater, for example, the structure's function of dissipating wave energy cannot be accomplished unless a large portion of the volume is void. Thus, although the rock structure retains the outward appearance of solidity, that appearance is deceiving. *See* testimony of William J. Herron and Dr. Richard J. Weggel, transcript of the Denver hearing at 270 and 402.

the Geneva Convention provides that "the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state." During the Denver hearing it became apparent that the territorial sea, as depicted by the United States on its National Ocean Survey Charts, appears to have been drawn by using at least some of the piers now in question as basepoints for swinging the three mile arc. *See* Transcript of the Denver Hearing at 209-10. California contends that, pursuant to Article 3, the United States is bound by these charts and may not now argue against using the piers for measuring the territorial sea.

Upon closer examination, however, I find that the charts in question are simply erroneous and do not represent the position of the United States government. In many places the depicted territorial sea bears no relationship to the natural coast line whatsoever, let alone to artificial structures erected along the coast. Some of the errors inhere in the impreciseness of the multi-colored printing processes used to publish the charts, some are due to changes in climate between the place where the charts were printed and the locale where the measurements were made, and some are simply the result of poor drafting. *See* Transcript of the Denver Hearing at 381-90. Note X on all National Ocean Survey charts contains a disclaimer covering just such a problem. I find that the charts are not susceptible of accurate use for purposes of Article 3, and that the piers do not, therefore, constitute a part of the coast line within the meaning of Article 3.

4. *Discussion—Article 8 and Artificial Structures.* The portion of the Supreme Court's 1965 opinion in this case dealing with artificial structures, quoted *supra* at 22, must be my starting point as that opinion is the law of this case. Although the quoted paragraphs underlie the heading "Artificial Accretions," the language in the passage refers more generally to "artificial structures." 381 U.S. at 176-77. The Supreme Court adopted the recommendation of Special Master Davis concerning these "artificial structures" so I have referred to his 1952 report in order to ascertain precisely what was intended by the Court's 1965 language. I find that Special Master Davis was discussing not just accretions, but also artificial structures built in or on the navigable sea. 1952 Report of the Special Master at 44-45.

Accordingly, there is no doubt that artificial structures erected along the California shore can modify the natural coast line. *See, e.g.*, the 1977 decree in the instant case, 432 U.S. 40, where several artificial structures are used as modifications of the natural coast line. As has been noted by the Court, this does not give California a mandate to push its boundary seaward by building more and more structures, because the United States retains the ability to control any construction over navigable waters and to condition such construction on an agreement not to alter the Submerged Lands Act boundary. Indeed, it is clear that the Army Corps of Engineers is now required to consider a proposed structure's effect on the Submerged Lands Act boundaries, and if any effect is indicated the Attorney General and Solicitor of the Department of Interior must be consulted before any permit may issue. 42 Fed. Reg. 37137 (1977), now codified in 33 C.F.R. § 320.4(f) (1978).

There is, however, a curious circularity involved. Paraphrasing the 1966 decree, the coast line is to be taken as modified by artificial means. 382 U.S. at 449. Although this sentence indicates that artificial structures can modify the coast line, it does not indicate that all artificial structures necessarily do modify the coast line. All that can definitely be concluded is that if a particular artificial structure does modify the coast line, then that modified coast line shall be used in determining the federal-state boundary. Some artificial structures may, consequently, modify the coast line, but others may not. There must be a balancing of the competing considerations involved, and I now turn to that process. In balancing the considerations I shall be guided by the practical approach of commentators McDougal and Burke, *The Public Order of the Oceans* at 387-88 (1962):

> When the construction of an area of land serves consequential coastal purposes, it would seem to be in the common interest to permit the object to be used for delimitation purposes....The principal policy issue in determining whether any effect for delimitation purposes ought to be attributed to other formations and structures is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist,

> requiring that the total area of the territorial sea be increased....

California bases its position largely on Article 8 of the Geneva Convention, which indicates that the outermost permanent harbor works forming an integral part of a harbor system shall be regarded as forming a part of the coast. The state points more specifically to paragraph 2 of the International Law Commission's (ILC) commentary[20] to what became Article 8 of the Geneva Convention: "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbor works." UN GA OR 11th Session Supplement No. 9 (A/3159), at 16. *See* Defendant's Exhibit C at 50, *et seq.*, and the transcript of the New York City hearing at 64-80. The key word in California's argument is jetty. ILC proceedings were conducted in both French and English, and the French *jeteé* can be translated as both jetty and pier. *See, e.g.*, transcript of the New York City hearing at 54, 142-43, and 260-62. Although there does appear to be a translation ambiguity,[21] I can assume that the word "jetties" as used in paragraph 2 of the ILC commentary does indeed mean "piers" without affecting the conclusions I reach in this report. I shall, accordingly, make that assumption.

The United States argues that the key words in Article 8 are "harbor works" forming an integral part of a "harbor system." It is in this context that the commentary refers to jetties and coast protective works. Accepting, *arguendo*, California's position that the term "jetties" in the commentary includes the concept of "piers," the federal government concludes that a pier must

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[20] The United Nations' International Law Commission worked on the law of the sea during the period from 1952 to 1956. These ILC meetings developed what was ultimately adopted as Article 8 of the Geneva Convention.

[21] The United States argues, *inter alia*, that none of the structures involved are "permanent," and the translation ambiguity need not be reached. I do not wish to become involved in a philosophical discussion of the concept of permanence — earthquakes occurring in California during the Denver hearings lead one to the conclusion that nothing is permanent — but, from a practical point of view, permanence is a function of design, purpose, and maintenance. Transcript of the Denver hearing at 257-58. I find that all of the structures involved are permanent.

nevertheless be part of a harbor system before it comes within the ambit of Article 8 and paragraph 2. None of the piers in question is part of a harbor or harbor system as those terms are defined in note 7, *supra*, because none of the piers provides an anchorage sheltered from weather conditions on the open sea. Article 8 and paragraph 2, the United States concludes, cannot apply.

California, on the other hand, cites to the final paragraph of footnote 64 in *United States v. Louisiana*, 394 U.S. 11, 49-50 (1969), for the proposition that a structure need not be connected with a harbor in order to be treated as forming a part of the coast. In the *Louisiana* case the federal government advanced the same position with respect to certain beach erosion jetties in the Gulf of Mexico as it now advances with respect to the piers. The Court, in footnote 64, appears to have rejected the United States' position. I nevertheless find that California attempts to read too much into the somewhat unclear language of the footnote. In that same footnote the Court held that the jetties in question were, in fact, harbor works connected with a true harbor. The Court thus did not need to reach the question of whether the jetties should be "assimilated" to harbor works. The footnote, moreover, was concerned solely with beach erosion jetties which were undisputedly coast protective works. The instant case poses the problem of piers which I have found are not coast protective works. The language of footnote 64, consequently, does not necessarily apply to the piers now under consideration.

In their efforts to apply Article 8 and earlier Supreme Court decrees to the instant problem, both Judge Jessup and Mr. Lauterpacht, *see* note 18, *supra*, have discussed the source materials exhaustively. When all is said and done it seems clear that the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers erected on the open coast and not directly connected with any conventional harbor. *See* Plaintiff's Exhibit 12 and Defendant's Exhibits C and C-1. After carefully reviewing the evidence before me in light of the testimony of both expert witnesses, I come back to the reasonableness test of Mc Dougal and Burke, *supra* at 26. I find that neither the piers nor the Rincon Island complex create an "interest in the surrounding waters that would not otherwise exist." Harbor works connected with a

conventional harbor, for example, create an interest in maintaining the navigational integrity and safety of the surrounding waters, and this interest justifies treating the artificial structures as modifications of the natural coast. Similarly, the artificial structures not connected with a harbor but which have been decreed a part of the coast serve specific functions relating to maintaining the natural shore line against the forces of erosion, creating navigable channels for ocean-going vessels, or otherwise aiding in coastal maintenance and improvement. In that context they, too, create an interest in the surrounding waters justifying use of the structures as basepoints for measuring the Submerged Lands Act boundaries. The piers in question provide no such coastal maintenance function and the volume of shipping handled by the three oil company piers, *see* subpart B, *supra*, does not justify assimilating those piers to harborworks within the meaning of Article 8.

I also note that Rincon Island could not qualify as an "island" for purposes of delimiting the territorial sea under the Geneva Convention because it is an artificial island. *See* Article 10 and transcript of the New York City hearing at 107-09. I do not think the fact that the island is connected to the mainland by a pier should have any effect on the result otherwise dictated by Article 10.

Pursuant to the foregoing I recommend that an order issue decreeing that the Rincon Island complex and the fifteen piers in question do not constitute artificial modifications of the coast, and that the California coast line follows the natural coast in the vicinity of these structures for purposes of fixing the federal-state boundary under the Submerged Lands Act.

VI CONCLUSION

I recommend that the Supreme Court adopt the decree proposed by the State of California as to the Port of San Pedro and San Diego (Paragraphs 1 and 2 of California's Proposed Fourth Supplemental Decree). I further recommend that the Supreme Court decree that neither the Rincon Island complex nor any of the fifteen piers constitute artificial modifications of the coast, and that the California coast line follows the natural coast in the vicinity of these structures for purposes of fixing the federal-state boundary under the Submerged Lands Act.

Denver, Colorado
August 20, 1979

Respectfully submitted,

Alfred A. Arraj
Special Master
C540 U.S. Courthouse
Denver, Colorado 80294

APPENDIX

The diagrams which follow are adapted from those found in California's Petition for Entry of a Fourth Supplemental Decree. The diagrams are intended solely for the purpose of illustrating the text of this report. They are not necessarily accurate, and they should not be used for taking measurements or for any other purpose requiring accuracy.

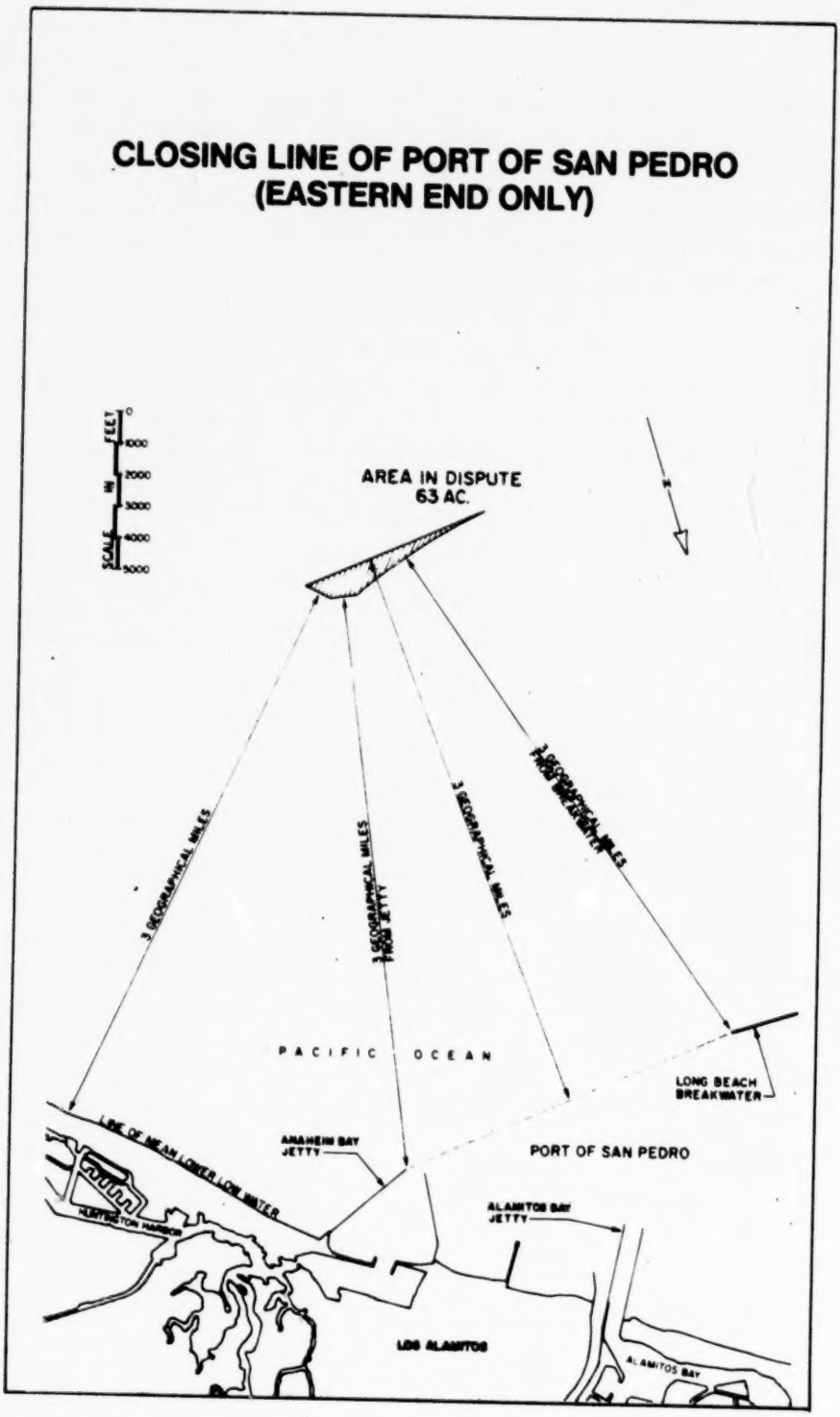
CLOSING LINE OF PORT OF SAN PEDRO
(EASTERN END ONLY)
SCALE IN FEET
0
1000
2000
3000
4000
5000
AREA IN DISPUTE
63 AC.
N
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM JETTY
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM BREAKWATER
PACIFIC OCEAN
LONG BEACH BREAKWATER
ANAHEIM BAY JETTY
PORT OF SAN PEDRO
LINE OF MEAN LOWER LOW WATER
HUNTINGTON HARBOR
ALAMITOS BAY JETTY
LOS ALAMITOS
ALAMITOS BAY

Figure 1

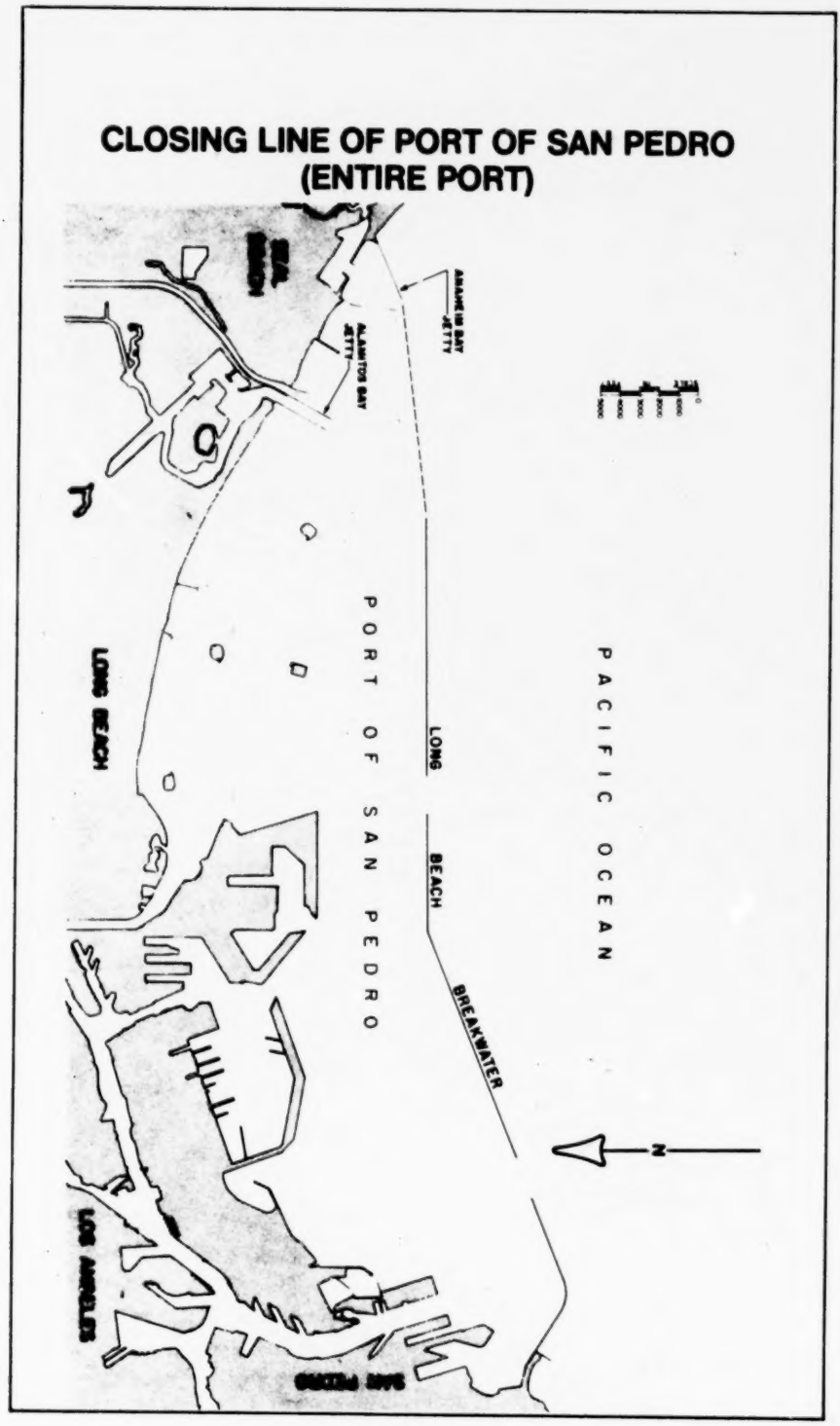
CLOSING LINE OF PORT OF SAN PEDRO
(ENTIRE PORT)
LONG BEACH
PORT OF SAN PEDRO
LONG BEACH BREAKWATER
PACIFIC OCEAN
N

Figure 1a

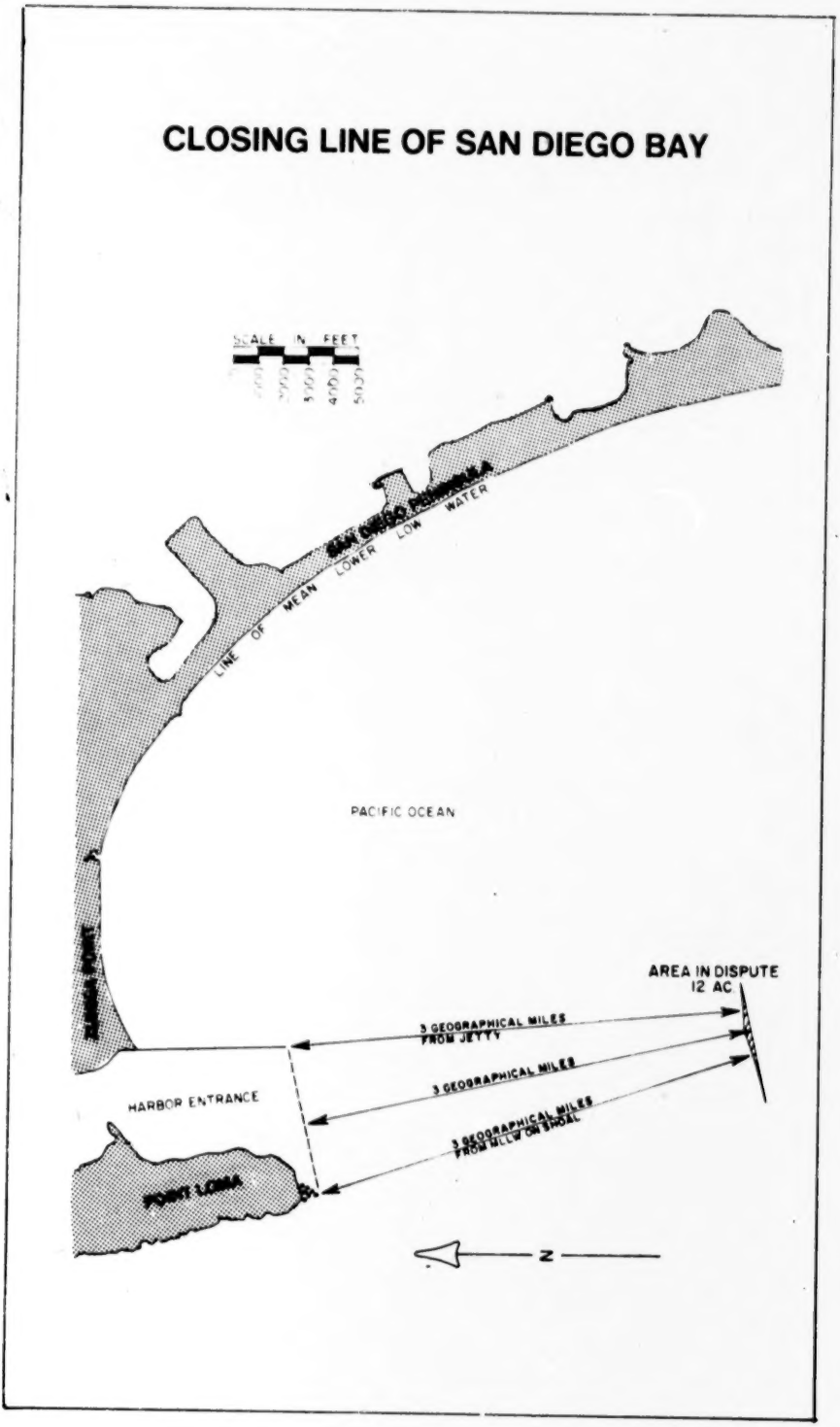
CLOSING LINE OF SAN DIEGO BAY
SCALE IN FEET
SAN DIEGO PENINSULA
LINE OF MEAN LOWER LOW WATER
PACIFIC OCEAN
POINT LOMA
AREA IN DISPUTE
12 AC
3 GEOGRAPHICAL MILES FROM JETTY
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM MLLW ON SHOAL
HARBOR ENTRANCE
POINT LOMA
N

Figure 2

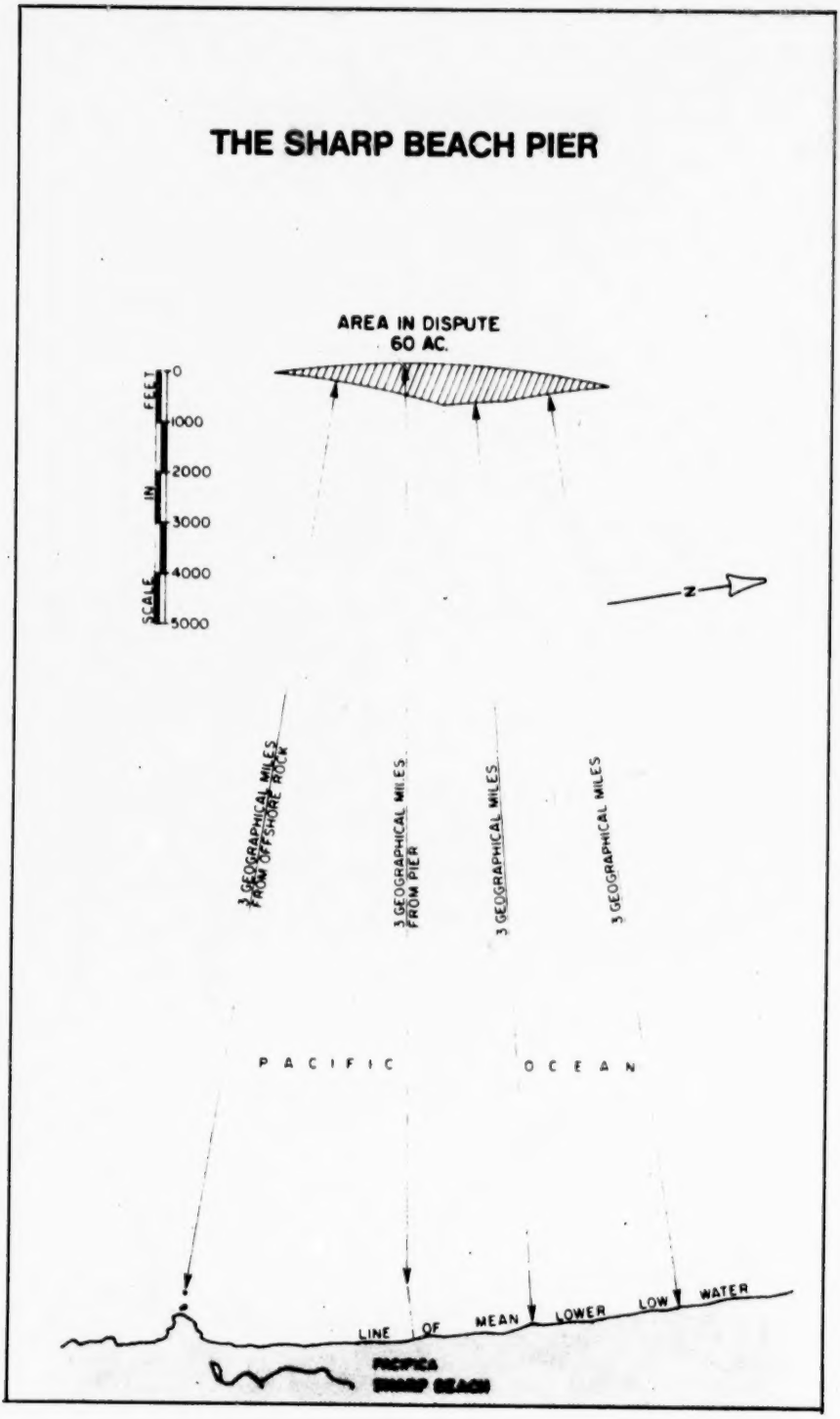
THE SHARP BEACH PIER
AREA IN DISPUTE
60 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
N
3 GEOGRAPHICAL MILES FROM OFFSHORE ROCK
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES
PACIFIC OCEAN
LINE OF MEAN LOWER LOW WATER
PACIFICA
SHARP BEACH

Figure 3

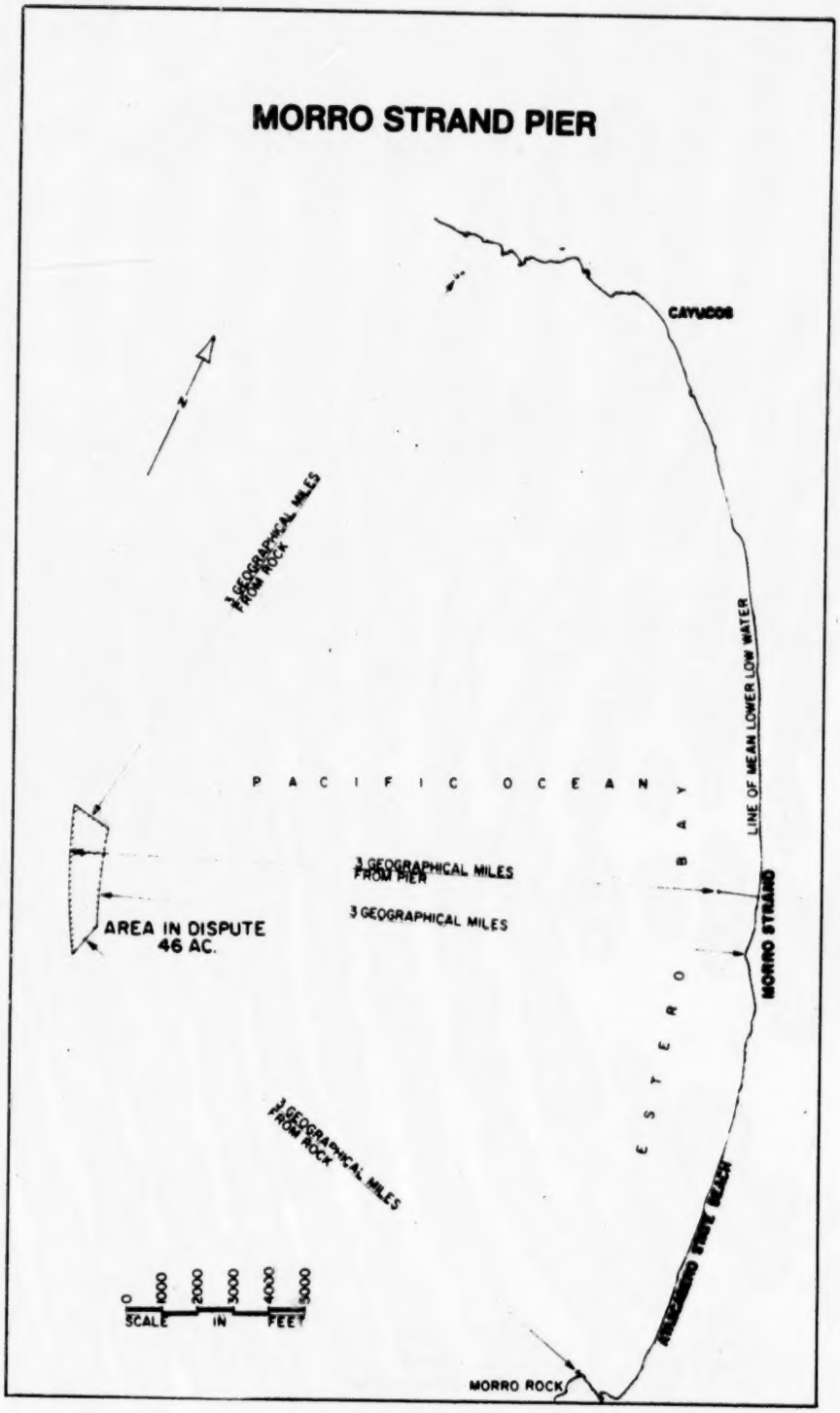
MORRO STRAND PIER
CAYUCOS
3 GEOGRAPHICAL MILES FROM ROCK
LINE OF MEAN LOWER LOW WATER
P A C I F I C O C E A N
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
AREA IN DISPUTE
46 AC.
E S T E R O B A Y
MORRO STRAND
3 GEOGRAPHICAL MILES FROM ROCK
0 1000 2000 3000 4000 5000
SCALE IN FEET
MORRO ROCK

Figure 4

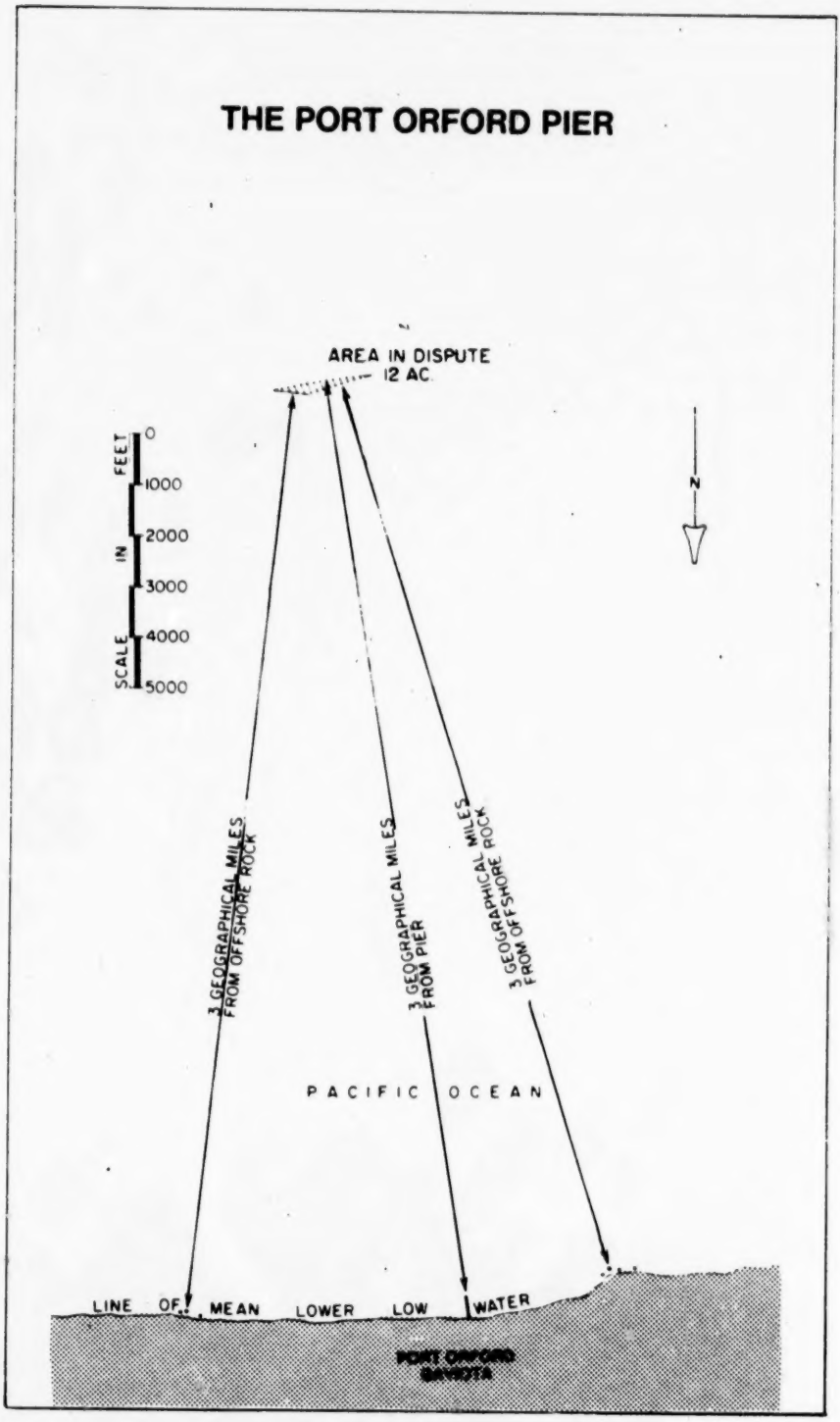
THE PORT ORFORD PIER
AREA IN DISPUTE
12 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
N
3 GEOGRAPHICAL MILES FROM OFFSHORE ROCK
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES FROM OFFSHORE ROCK
PACIFIC OCEAN
LINE OF MEAN LOWER LOW WATER
PORT ORFORD
OREGON

Figure 5

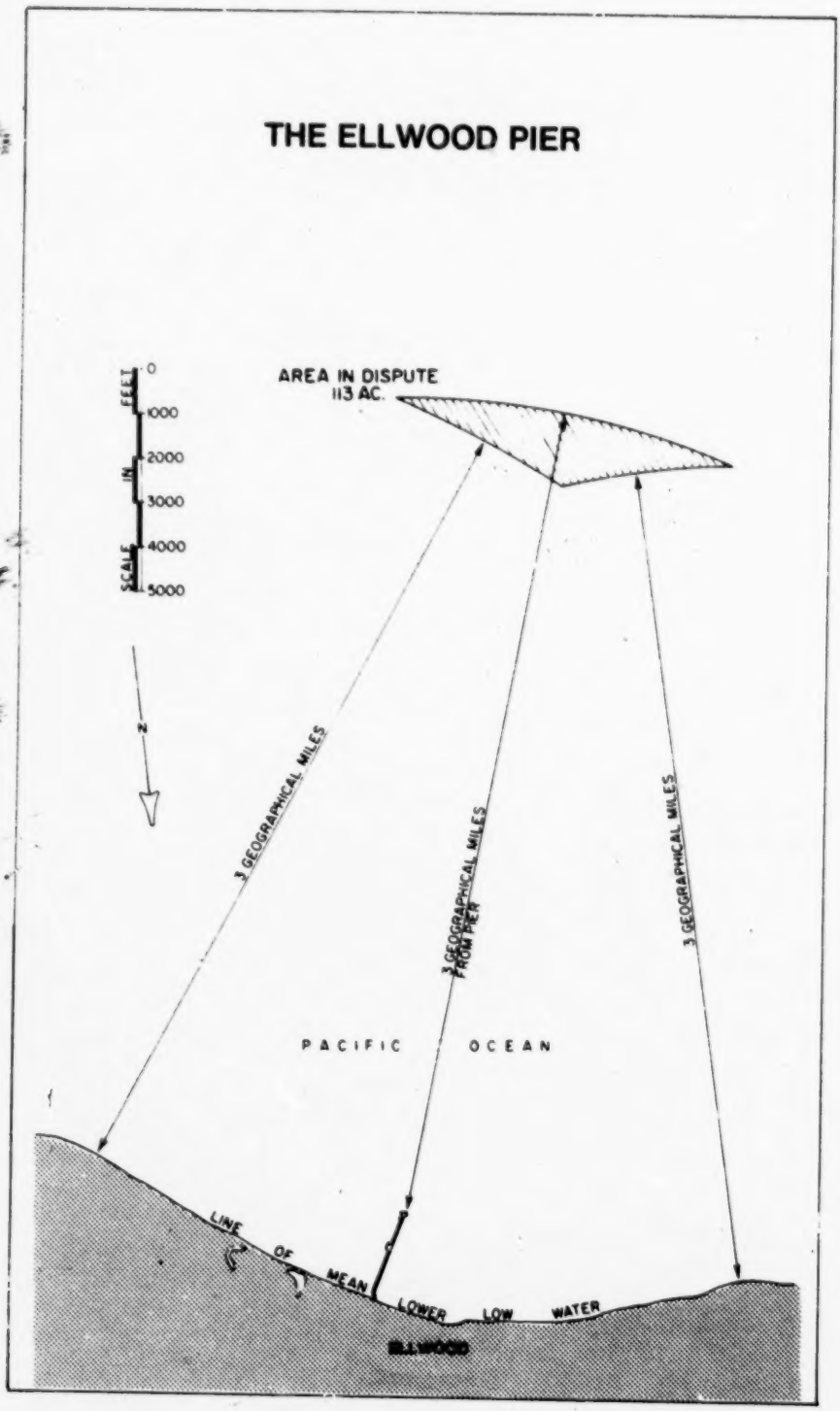
THE ELLWOOD PIER
AREA IN DISPUTE
113 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
N
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
PACIFIC OCEAN
LINE OF MEAN LOWER LOW WATER
ELLWOOD

Figure 6

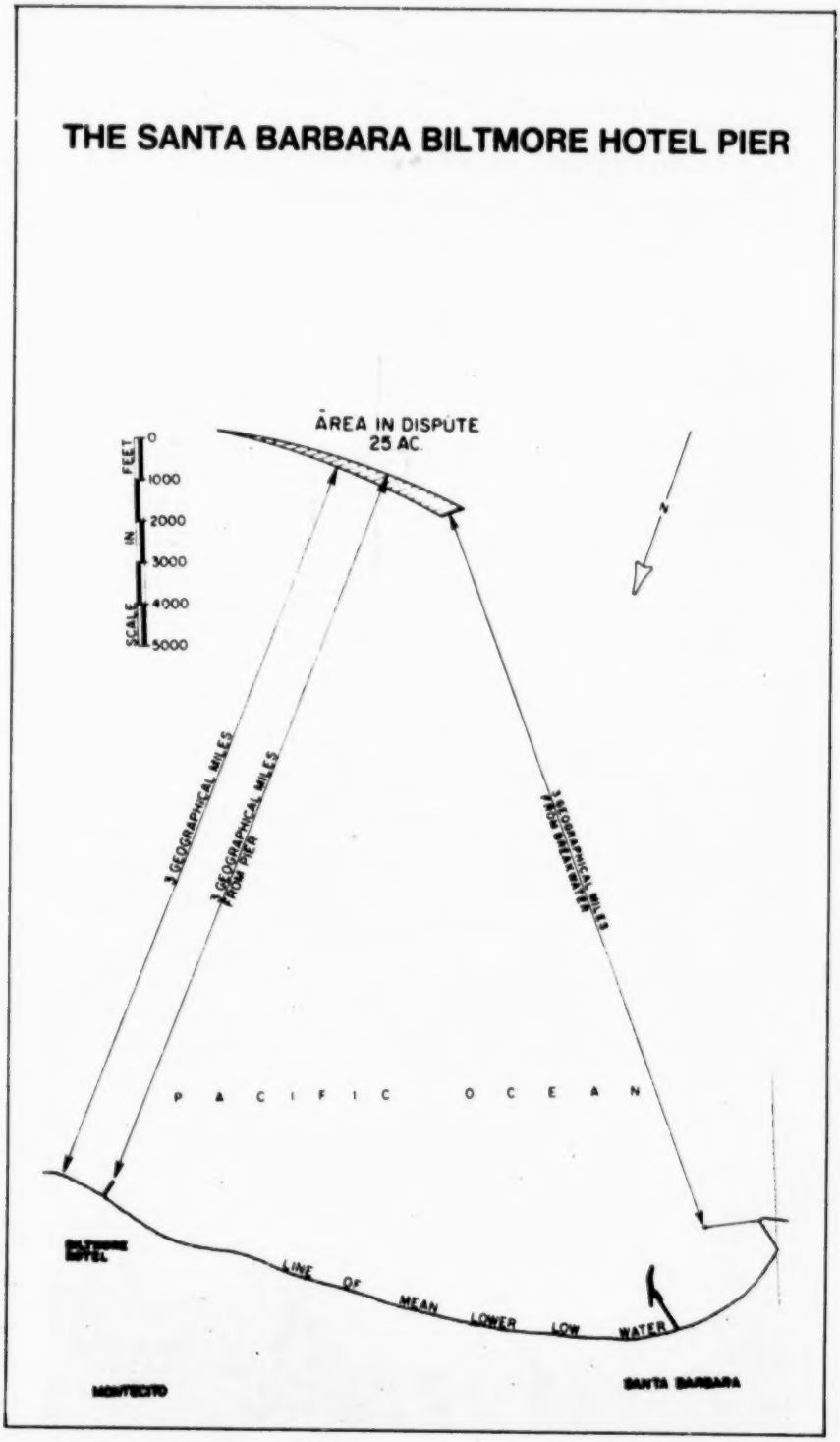
THE SANTA BARBARA BILTMORE HOTEL PIER
AREA IN DISPUTE
25 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES FROM BREAKWATER
N
P A C I F I C O C E A N
LINE OF MEAN LOWER LOW WATER
MONTECITO
SANTA BARBARA

Figure 7

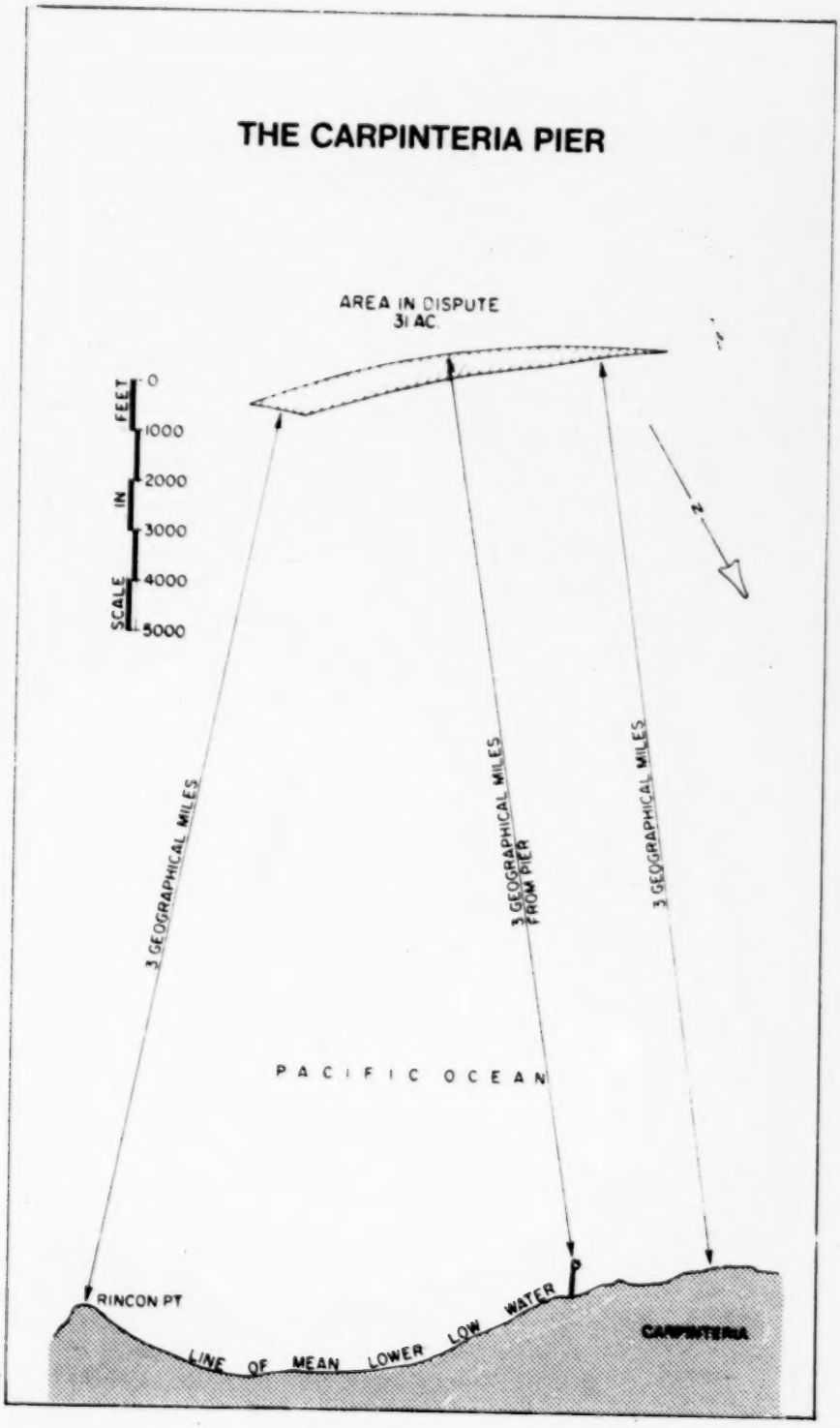
THE CARPINTERIA PIER
AREA IN DISPUTE
31 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
N
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
PACIFIC OCEAN
RINCON PT
LINE OF MEAN LOWER LOW WATER
CARPINTERIA

Figure 8

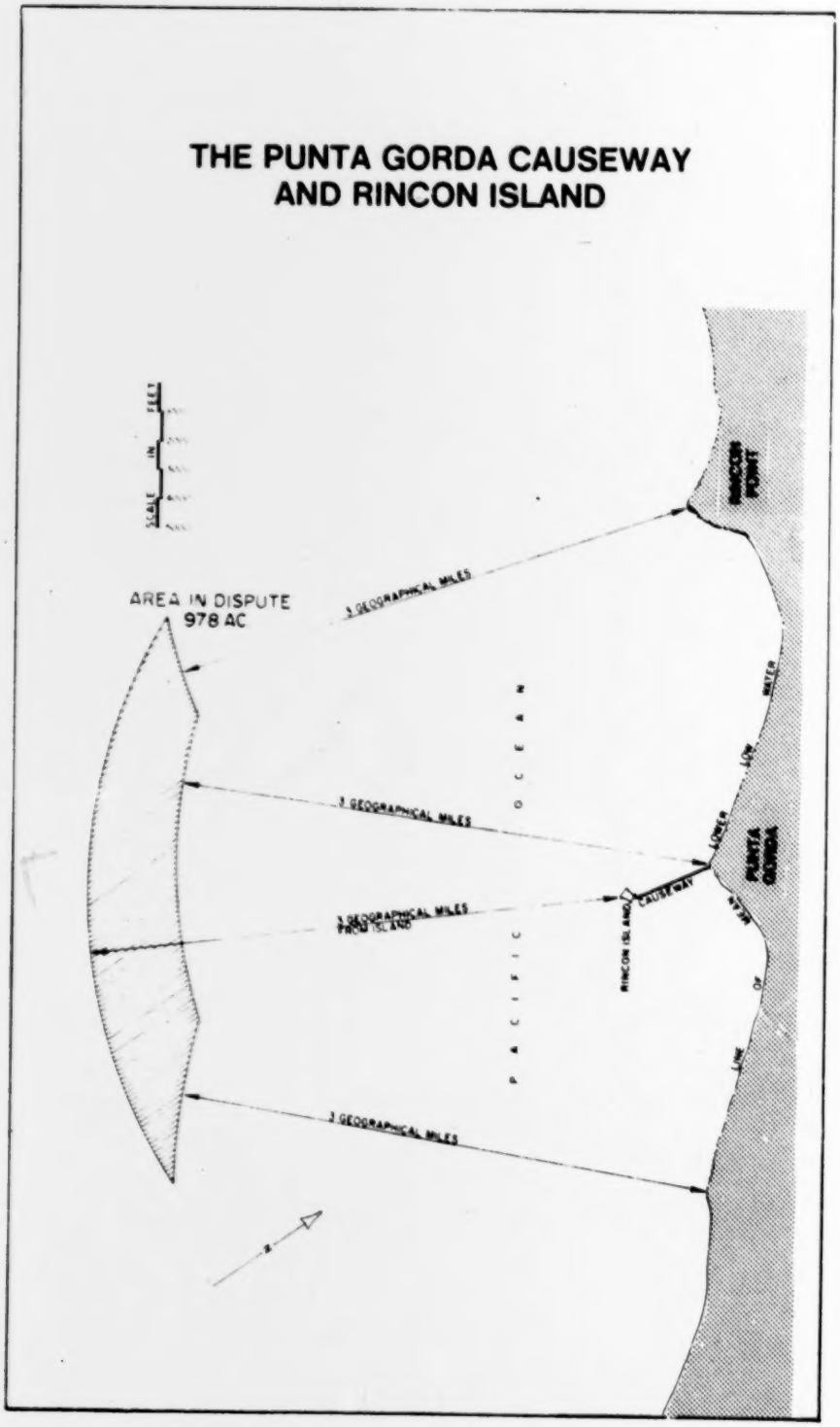
THE PUNTA GORDA CAUSEWAY
AND RINCON ISLAND
SCALE IN FEET
AREA IN DISPUTE
978 AC
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES
FROM ISLAND
3 GEOGRAPHICAL MILES
OCEAN
PACIFIC
RINCON ISLAND
CAUSEWAY
LOW WATER
PUNTA GORDA
LOW WATER

Figure 9

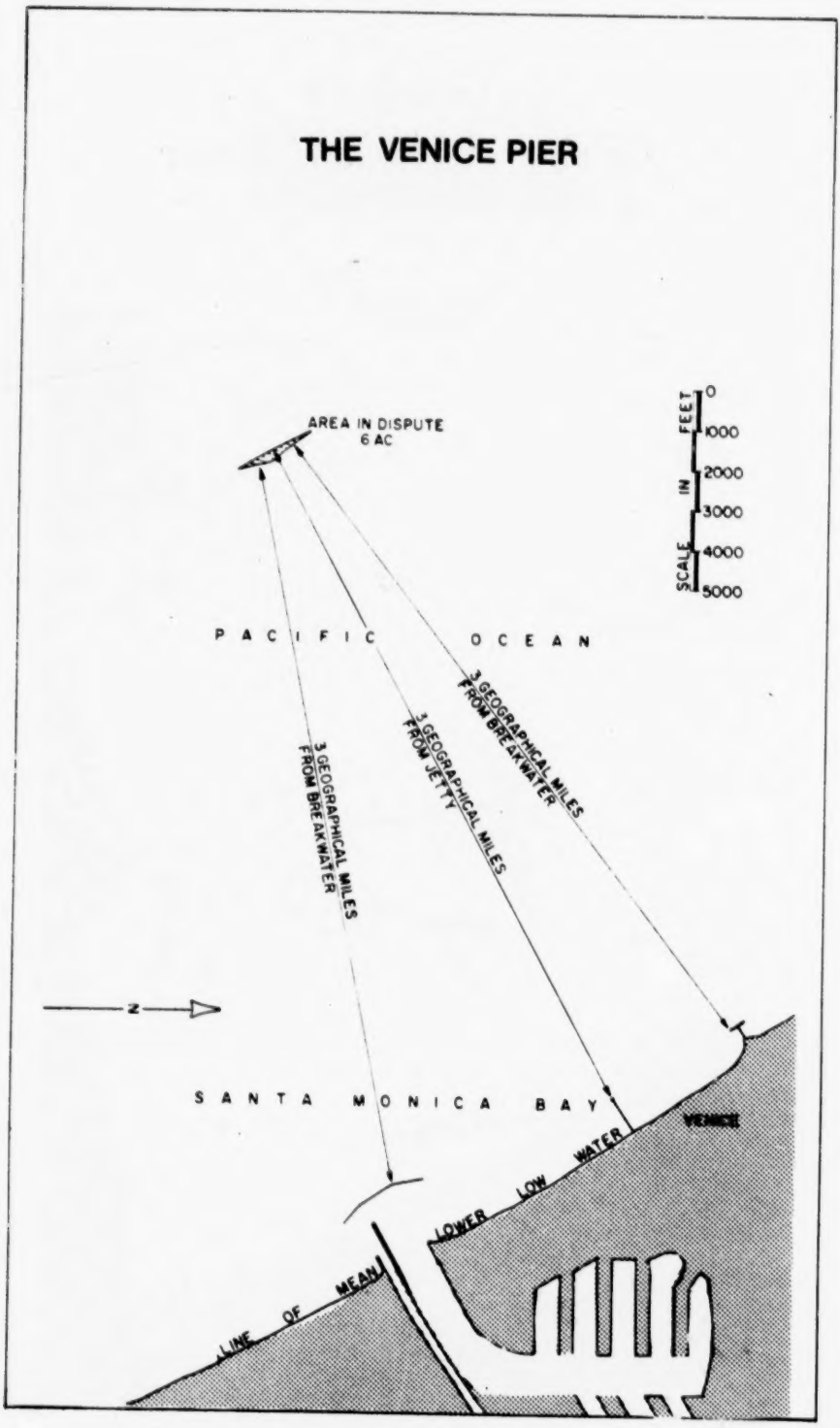
THE VENICE PIER
AREA IN DISPUTE
6 AC
SCALE IN FEET
0
1000
2000
3000
4000
5000
PACIFIC OCEAN
3 GEOGRAPHICAL MILES FROM BREAKWATER
3 GEOGRAPHICAL MILES FROM JETTY
3 GEOGRAPHICAL MILES FROM BREAKWATER
N
SANTA MONICA BAY
VENICE
LOWER LOW WATER
LINE OF MEAN

Figure 10

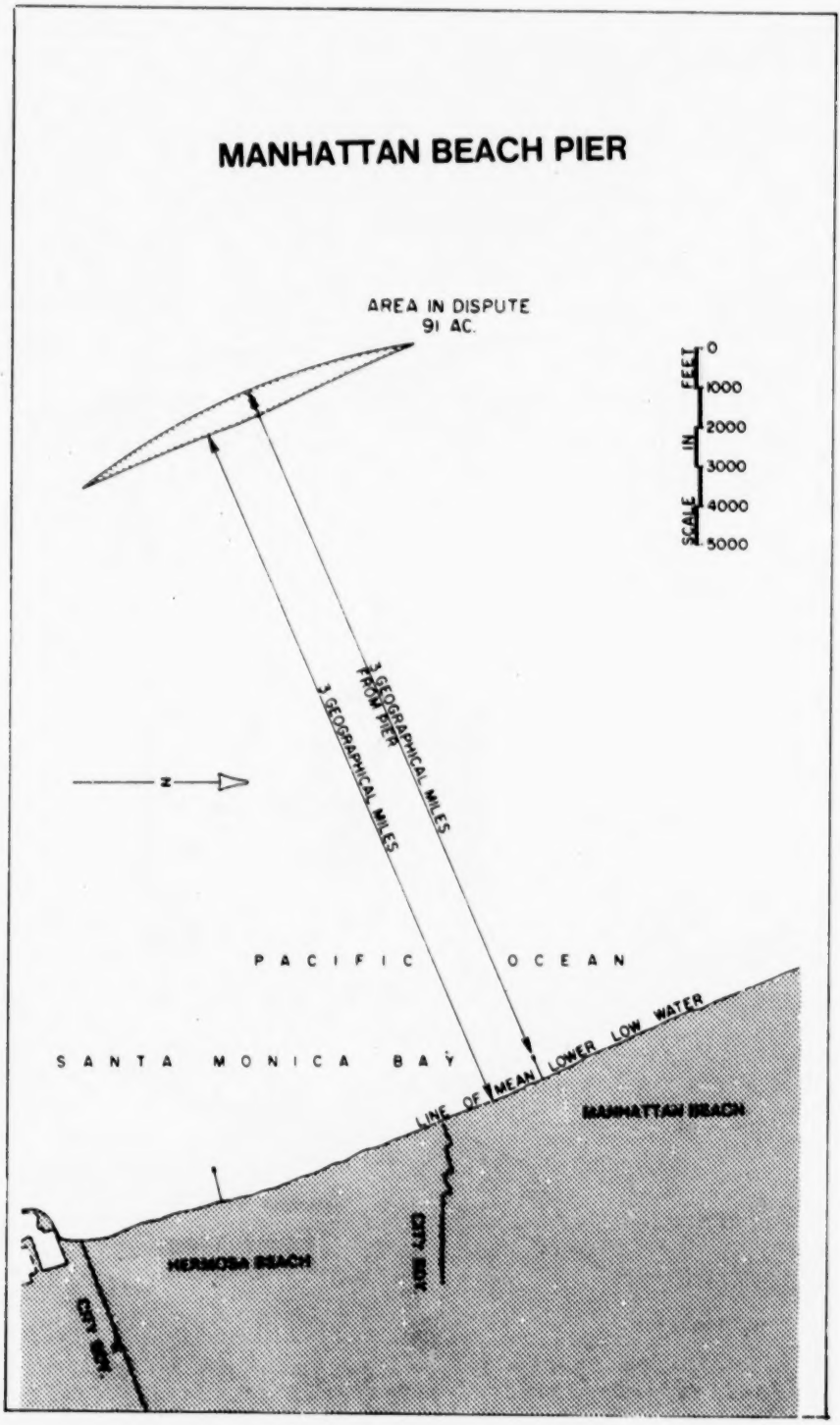
MANHATTAN BEACH PIER
AREA IN DISPUTE
91 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
N
PACIFIC OCEAN
SANTA MONICA BAY
LINE OF MEAN LOWER LOW WATER
MANHATTAN BEACH
HERMOSA BEACH
CITY BDY.
CITY BDY.

Figure 11

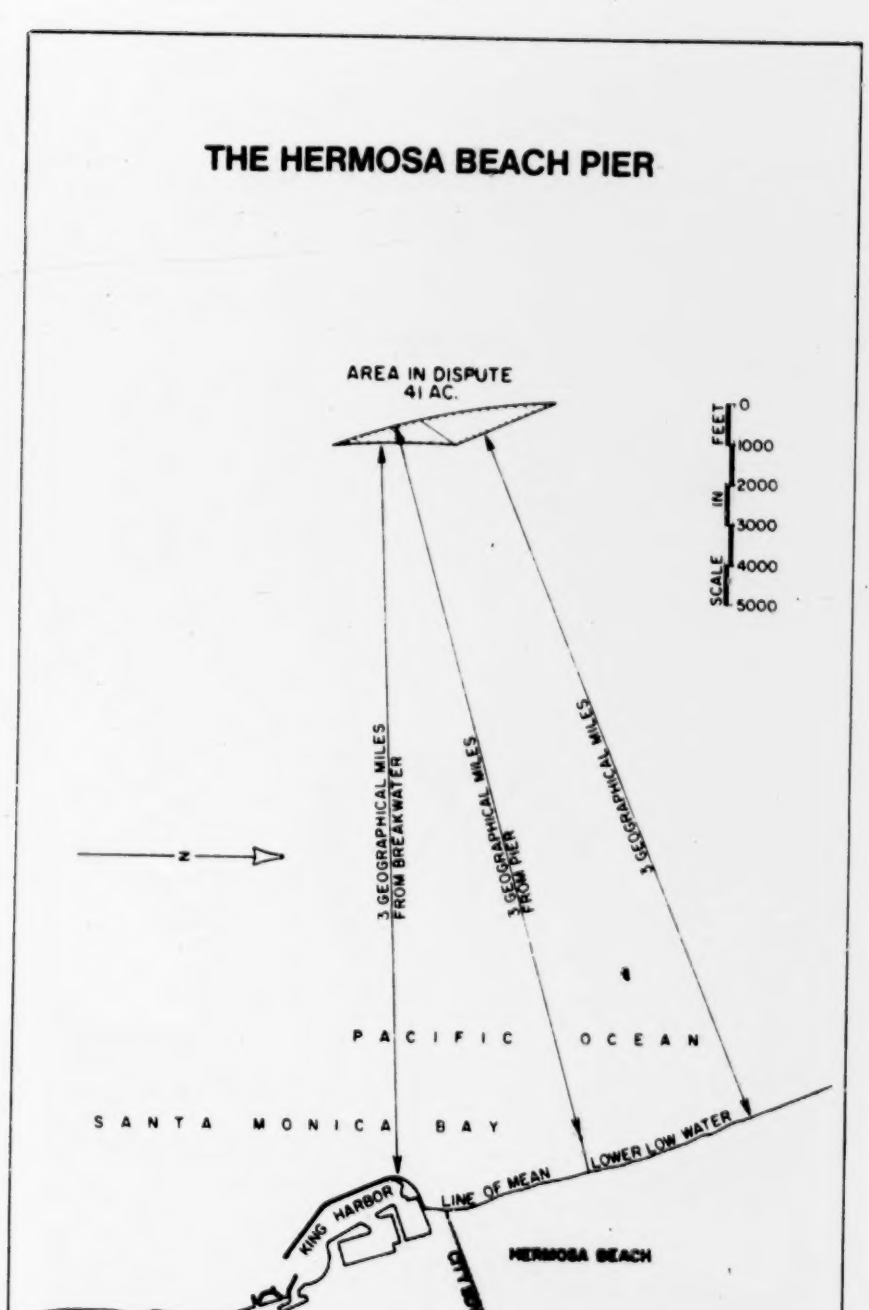
THE HERMOSA BEACH PIER
AREA IN DISPUTE
41 AC.
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES FROM BREAKWATER
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
N
PACIFIC OCEAN
SANTA MONICA BAY
LOWER LOW WATER
LINE OF MEAN
KING HARBOR
HERMOSA BEACH
REDONDO BEACH

Figure 12

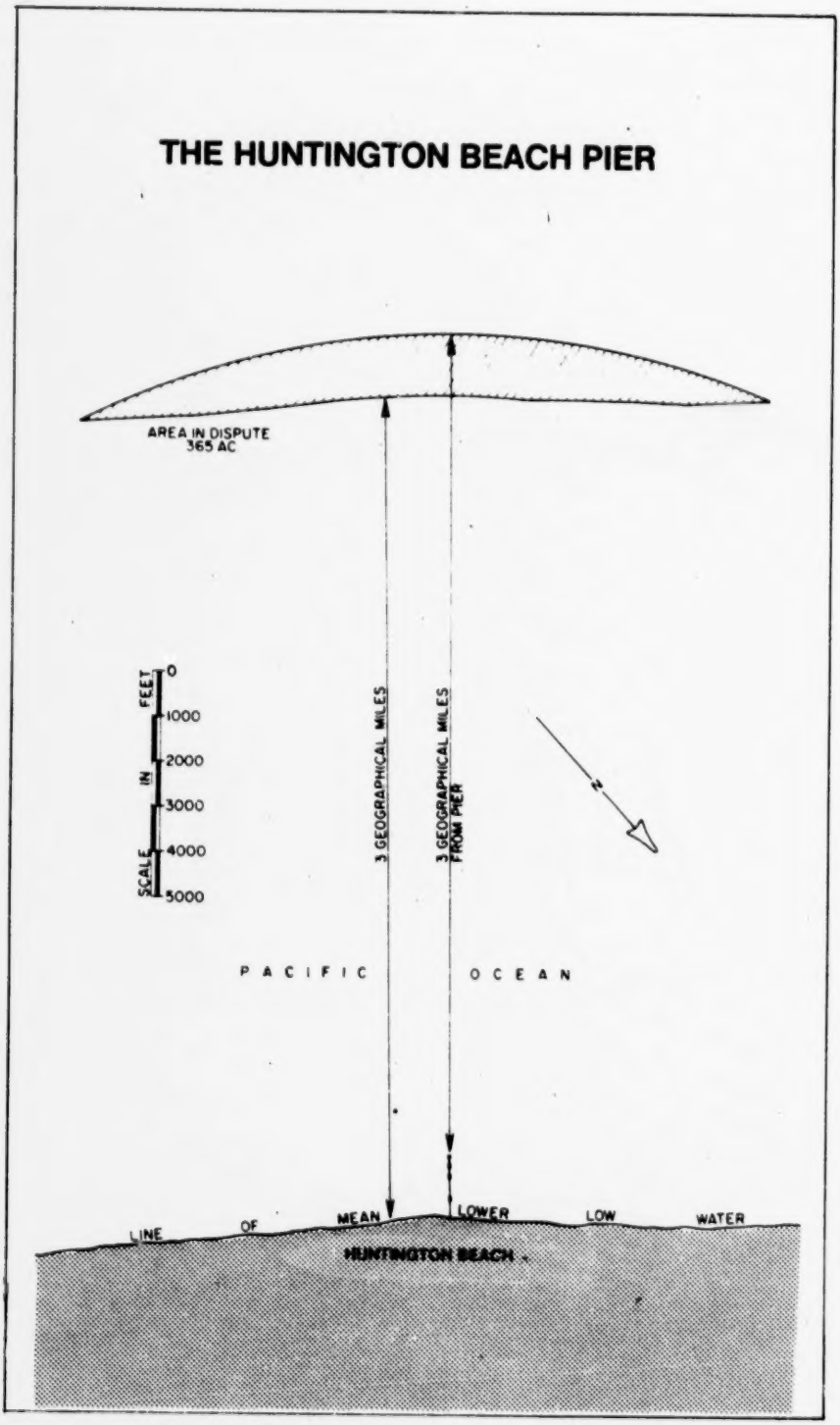
THE HUNTINGTON BEACH PIER
AREA IN DISPUTE
365 AC
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
N
PACIFIC OCEAN
LINE OF MEAN LOWER LOW WATER
HUNTINGTON BEACH

Figure 13

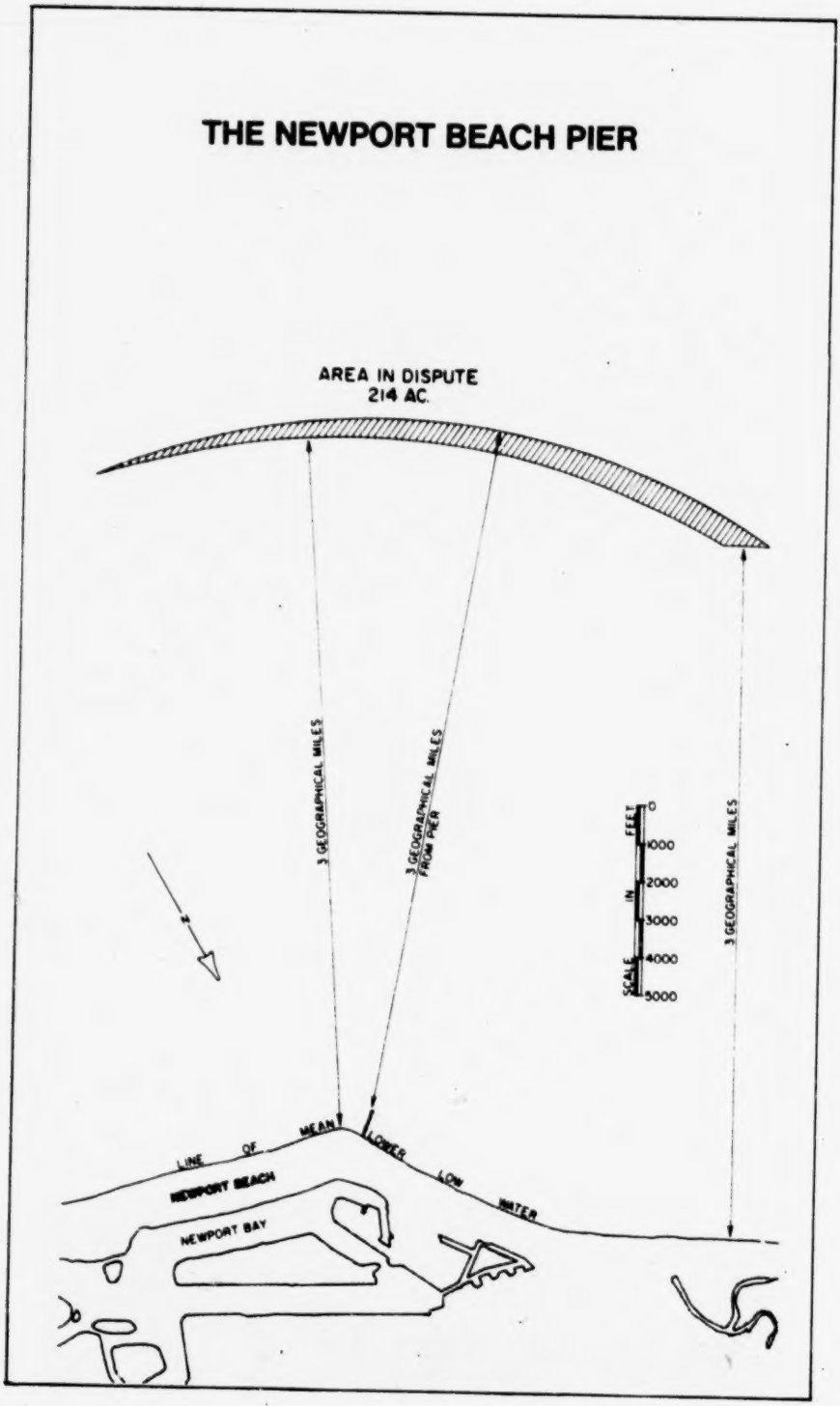
THE NEWPORT BEACH PIER
AREA IN DISPUTE
214 AC.
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
SCALE IN FEET
0
1000
2000
3000
4000
5000
LINE OF MEAN LOWER LOW WATER
NEWPORT BEACH
NEWPORT BAY

Figure 14

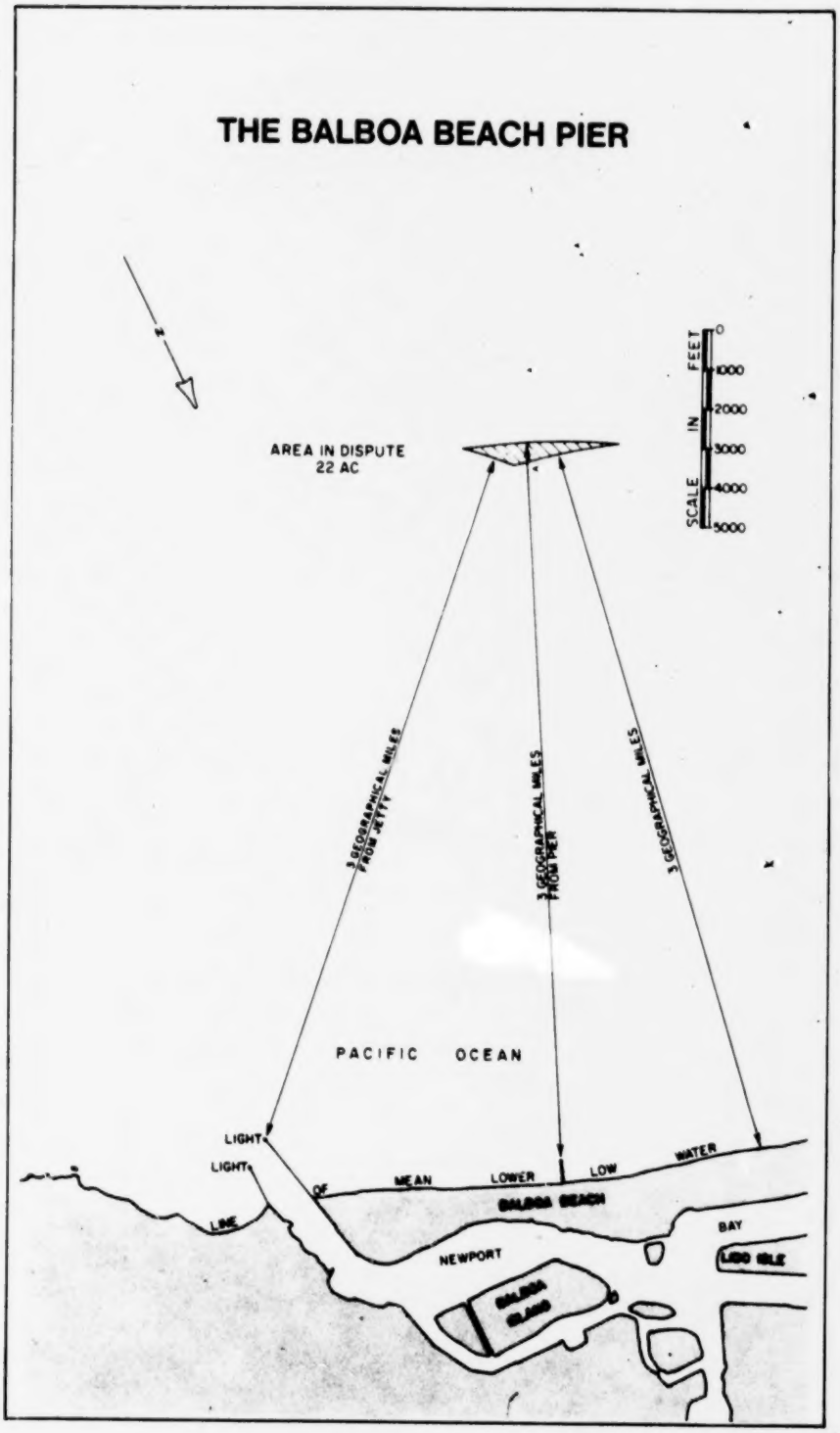
THE BALBOA BEACH PIER
AREA IN DISPUTE
22 AC
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES FROM JETTY
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES
PACIFIC OCEAN
LIGHT
LIGHT
LINE
OF MEAN LOWER LOW WATER
BALBOA BEACH
BAY
NEWPORT
LIDO ISLE
BALBOA ISLAND

Figure 15

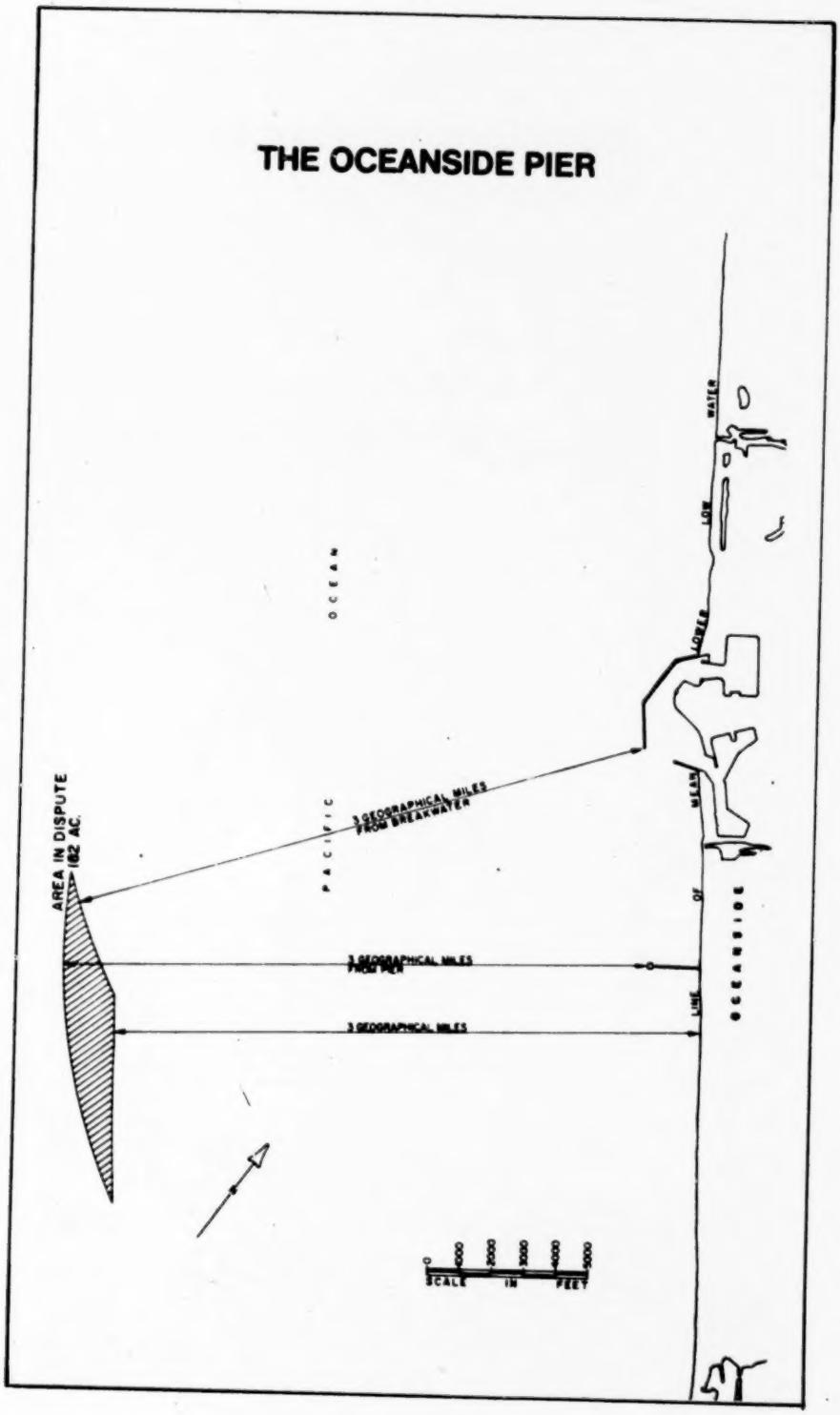
THE OCEANSIDE PIER
OCEAN
PACIFIC
AREA IN DISPUTE
182 AC.
3 GEOGRAPHICAL MILES
FROM BREAKWATER
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES
MEAN LOW WATER LINE OF OCEANSIDE
SCALE IN FEET
0
1000
2000
3000
4000
5000

Figure 16

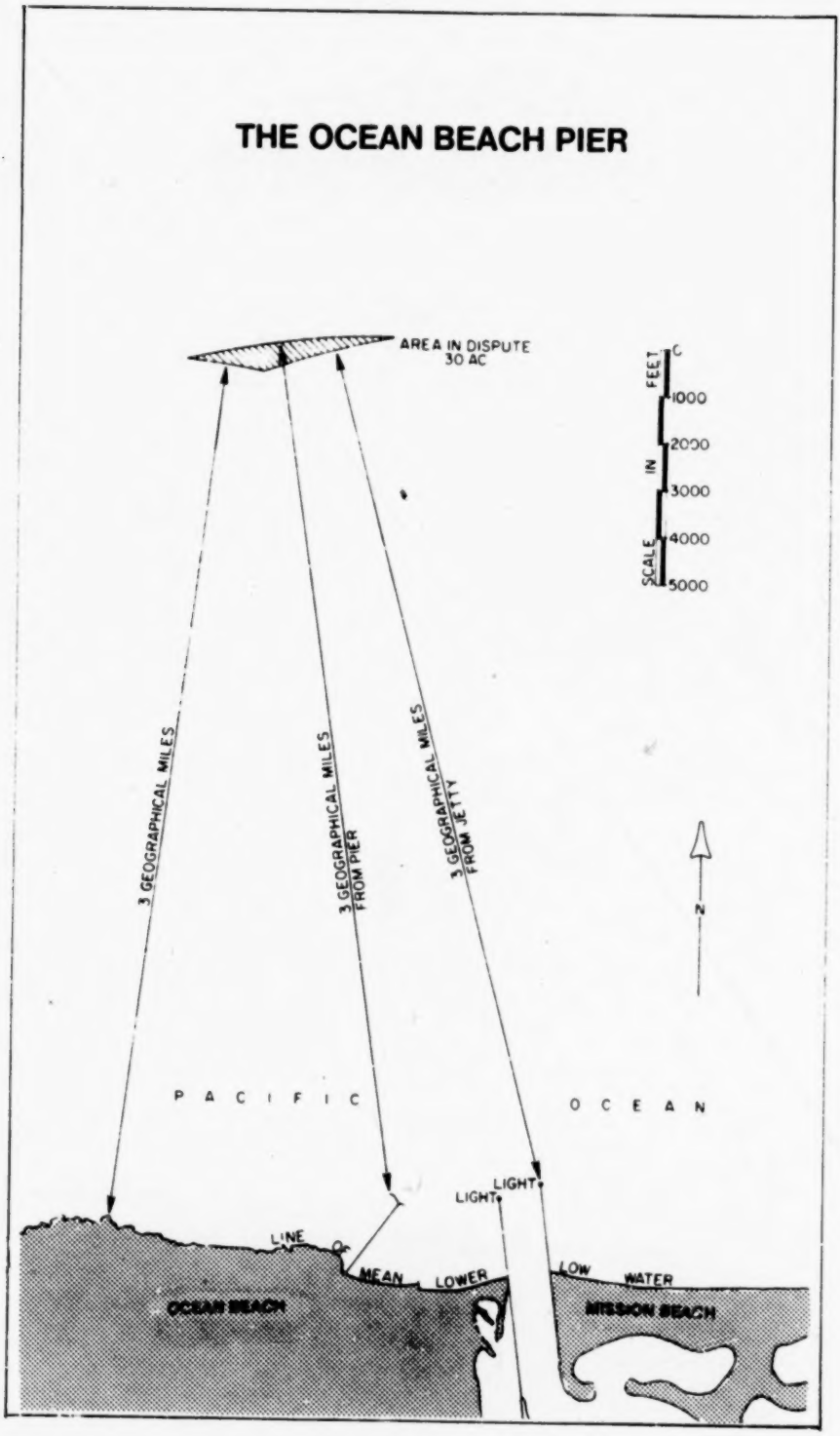
THE OCEAN BEACH PIER
AREA IN DISPUTE
30 AC
SCALE IN FEET
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES FROM JETTY
N
PACIFIC
OCEAN
LIGHT
LIGHT
LINE OF
MEAN
LOWER
LOW
WATER
OCEAN BEACH
MISSION BEACH

Figure 17

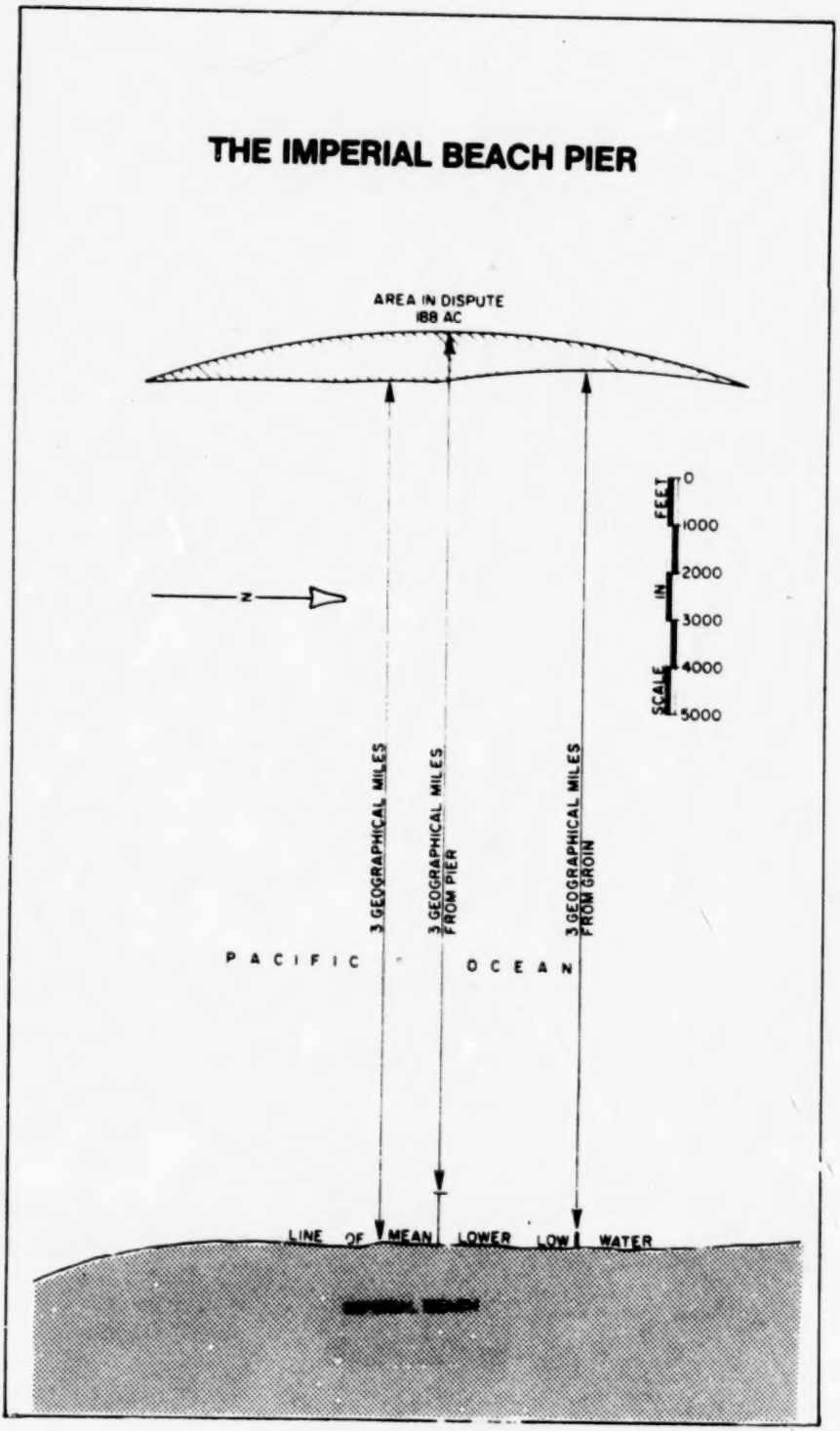
THE IMPERIAL BEACH PIER
AREA IN DISPUTE
188 AC
N
SCALE IN FEET
0
1000
2000
3000
4000
5000
3 GEOGRAPHICAL MILES
3 GEOGRAPHICAL MILES FROM PIER
3 GEOGRAPHICAL MILES FROM GROIN
PACIFIC OCEAN
LINE OF MEAN LOWER LOW WATER

Figure 18

Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

EXCEPTION OF THE STATE OF CALIFORNIA AND SUPPORTING BRIEF

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I

This court has established that port facilities as well as "structures not closely linked to ports," if permanent and connected with the mainland, are to be regarded as parts of the coast. Under these principles, the sixteen piers constitute parts of California's coast 16

A. The principles established by this court for determining the status of coastal installations derive primarily from two provisions of the Convention on the Territorial Sea and the Contiguous Zone, Article 3 and Article 8 16

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A. The test employed by the special master was designed by its authors to apply not to coastal structures, but to artificial islands 34

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TABLE OF AUTHORITIES CITED

Cases

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East v. Oosting, 245 F.Supp. 51 (E. D. Va. 1965) 42
Hasting v. Mann, 340 F.2d 910 (4th Cir. 1965), cert. den. 380 U.S. 963 (1965) 42
Johnson v. Traynor, 243 F.Supp. 184 (D. Md. 1965) 41
Kinkhead v. United States, 150 U.S. 483 (1893) 21
Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640 (2d Cir. 1965) 42
Nacirema Co. v. Johnson, 396 U.S. 212 (1969) 42
Oklahoma v. Texas, 260 U.S. 606 (1923) 21
People v. Stralla, 14 Cal.2d 617, 96 P.2d 941 (1939) 13
The Haxby, 94 Fed. 1016 (1899) 41
Travelers Insurance Company v. Shea, 382 F.2d 344 (5th Cir. 1967) 42
United States v. California, 332 U.S. 19 (1947) 4
United States v. California, 381 U.S. 139 (1965) 5, 14, 18, 30
United States v. California, 382 U.S. 448 (1966) First Supplemental Decree) 1, 2, 5, 13, 14, 16, 18
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United States v. California, 436 U.S. 32 (1978) 5
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United States v. Louisiana, 363 U.S. 1 (1960) 4, 39
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United States v. Texas, 162 U.S. 1 (1896) 21
United States v. Texas, 339 U.S. 707 (1950) 4
Western Maryland T. R. Co. v. Mayor, etc. of Baltimore, 68 Atl. 6 (Md. 1907) 42

Treaties

Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606: 3, 14, 27, 28
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Convention on the Continental Shelf, T.I.A.S. No. 5578, 15 U.S.T. (Pt. 1) 471 40

Table of Authorities

Statutes

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33 U.S.C. § 426 (e)	36
Submerged Lands Act, 67 Stat. 29:	
43 U.S.C. § 1301, et seq.	3
43 U.S.C. § 1301 (b)	4
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Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451	11, 37

Constitution

United States Constitution: Article III, Section 2, Clause 2	1

United Nations Documents

Official Records, U.N. Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone), U.N. Doc. A/CONF. 13/39 (1958)	27
Regime of the High Seas and Regime of the Territorial Sea, Comments by Governments, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CN.4/99/Add. 1 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1956/Add. 1	25
Report of the International Law Commission to the General Assembly, 9 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER. A/1954/Add. 1	24
Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9), Annex (Item 16), U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER. A/1955/Add. 1	24
Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER. A/1956/Add. 1	19, 26
Summary Records of the 6th Session, [1954] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER. A/1954	24
Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1955	25
Summary Records of the 8th Session, [1956] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1956	25

Table of Authorities

Miscellaneous

Page

Bancroft's Works, Vol. XXIII, History of California Vol. VI (1888) 7

Bartlett, "The Battle for Southern Pacific Ports," Westways (August, 1935) 9

Boggs, "Delimitation of the Territorial Sea," 29 Am. J. Int. L. 541 (1930) 32

Briggs, The International Law Commission (1965) 21

Dana, Two Years Before the Mast (B. F. Collier & Son 1969) .. 7

Davidson, Coast Pilot of California, Oregon and Washington (4th ed. 1889) 12

Davidson, Directory for the Pacific Coast of the United States, Report to the Superintendent of the U.S. Coast Survey (1862) 12

3 Gidel, *Le Droit International Public de la Mer* (1935) 23

Hearings before the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, 1st Session, on S.J. Res. 13, etc. (1953) 39, 40

House of Representatives Report No. 2515, 82d Congress, 2d Sess. (1952) 7

2 Hyde, International Law Chiefly as Interpreted and Applied by the United States (2d rev. ed. 1945) 21

Ingersoll, Century History of Santa Monica Bay Cities (Los Angeles, 1908) 8, 9, 12

League of Nations, Report of the Second Committee, Conference for the Codification of International Law, The Hague, 1930, C.230.m.117.1930.V 22

Marquez, Port Los Angeles: A Phenomenon of the Railroad Era (San Marino 1975) 7, 8, 9, 10

McDougal and Burke, The Public Order of the Oceans (1962) 34, 36

Newmark, Sixty Years in Southern California (N.Y. 1926) .. 7, 8, 9

Pearcy, "Measurement of the U.S. Territorial Sea," XL United States Department of State Bulletin, No. 1044 (June 20, 1959) 42

Proclamation No. 2667, 59 Stat. 884 40

Report of Special Master William H. Davis, United States v. California (then) No. 6, Original, Oct. 14, 1952 ..... 7, 10, 11, 13, 14, 17

Senator Holland, 99 Cong. Rec. p. 257 38

Shalowitz, Shore and Sea Boundaries (2 Vols.) (1962) .. 21, 31, 32

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Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3 (1965)	42
Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3 (1969)	43
United Nations Charter Article 13	20
United States Coast Pilot 7 (13th ed. 1977)	37
Warren, History of the Santa Monica Bay Region (Santa Monica, 1934)	9
4 Whiteman, Digest of International Law (1965)	27, 30, 42
Willard, The Free Harbor Contest at Los Angeles (Los Angeles, 1899)	8, 9

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

EXCEPTION OF THE STATE OF CALIFORNIA

The State of California excepts to the Special Master's recommendation that this Court decree that none of the sixteen piers on the California coast, including the Rincon Island-Punta Gorda "Causeway" complex, constitutes an artificial modification of the coast, and that the California coast line follows the natural coast in the vicinity of these structures for purposes of fixing the federal-state boundary under the Submerged Lands Act. The Special Master's discussion of this question is contained at pages 19 through 29 of his Report. His recommendation is given at page 30.

November 14, 1979

Respectfully submitted,

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Attorneys for Defendant

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

VS.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF ITS EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

JURISDICTION

The United States initiated this action against the State of California in 1945, invoking the original jurisdiction of this Court conferred by Article III, Section 2, Clause 2 of the United States Constitution. In its first decree herein, 332 U.S. 804, 805 (1947) this Court reserved jurisdiction, ". . . to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree." *Id.*

Since that time, three supplemental decrees have been entered. *United States v. California,* 382 U.S. 448, 453 (1966); *United States v. California,* 432 U.S. 40, 42 (1977); and *United States v. California,* ..... U.S. ....., 99 S. Ct. 556,

557 (1978). Each of these decrees has contained a paragraph making explicit the Court's retention of jurisdiction to entertain further proceedings, enter orders, and issue writs either to give proper force and effect to its decree or to effectuate the rights of the parties in the premises. *Id.*

In these Cross-Motions for Entry of a Fourth Supplemental Decree, the parties invoke the jurisdiction retained by this Court in its decrees of 1947, 1966, 1977 and 1978, particularly with reference to the following statement from its 1966 decree:

> ". . . As to any portion of such boundary line or of any areas claimed to have been reserved under section 5 of the Submerged Lands Act as to which the parties may have been unable to agree, either party may apply to the Court at any time for the entry of a further supplemental decree." *United States v. California, supra* at 453, paragraph 13.

QUESTION PRESENTED

Do sixteen piers on the California coast, including the Rincon Island-Punta Gorda "Causeway" complex, constitute parts of California's "coast line" as that expression is used in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §1301 (c)? More precisely, do these sixteen structures constitute "artificial modifications" or "artificial extensions" of California's coast line according to the principles established in this Court's prior decisions and decrees herein?

TREATY AND STATUTE INVOLVED

Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606, Articles 3 and 8.

Article 3 provides:

> "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

Article 8 provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 (c). This section provides:

> "(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

STATEMENT OF THE CASE

These cross-motions for a Fourth Supplemental Decree present three of the last remaining questions respecting the location of the seaward boundary of the land "confirmed" to California by operation of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*[1] California excepts

---

[1]The parties anticipate that the remaining questions can be resolved by agreement.

to the recommendations of the Special Master as to one question only: Whether sixteen piers on the California coast constitute artificial "modifications" or "extensions" of the "coast line" within the meaning of this Court's prior decrees in this case. If they do, the seaward boundary of the lands confirmed to California by the Submerged Lands Act is to be measured from the ends of those piers.[2] The Special Master recommended a decree that they do not. The lands in dispute are approximately 2,500 acres, most of which lie within areas of present oil development.

The United States filed this action in 1945 to determine ownership of the lands underlying the "three-mile belt" off California's coast. In the first decision herein, this Court held that while the United States had not established its own title to the submerged lands, it nonetheless held "paramount rights" in them. *United States v. California,* 332 U.S. 19 (1947); *id.* at 43 (Frankfurter, J., dissenting); *United States v. Texas* 339 U.S. 707, 723-24 (1950) (opinion of Frankfurter, J.). Six years later, passage of the Submerged Lands Act "restored" to the seaboard States the rights to their offshore submerged lands, rights Congress felt had been divested by the first decision in this case. *United States v. Louisiana,* 363 U.S. 1, 28 (1960). In the case of certain Gulf Coast States the Act operated to restore title to the submerged lands lying within nine nautical miles of the "coast line." In the case of California it restored title to those lands within three nautical miles of the "coast line." 43 U.S.C. § 1301 (b), (c).

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[2]For illustrations of the effect on the offshore boundary of treating the piers as parts of the coast, see Appendix A of the Report of the Special Master, pp. 35-50.

The expression "coast line" is defined in the Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ." 43 U.S.C. § 1301 (c). This case has been before the Court several times since passage of the Submerged Lands Act, principally for determinations of the location of the "coast line" along specific areas of California's coast.[3]

The present cross-motions for a fourth supplemental decree, filed during the October Term, 1977, seek determinations of the location of California's "coast line" in three respects. The parties seek a determination of the line enclosing the inland waters of San Pedro Bay, and also of the line enclosing the inland waters of San Diego Bay. The third question is whether sixteen piers on the California coast are "artificial modifications" or "artificial extensions" of California's coast line within the meaning of prior decrees herein. The Hon. Alfred A. Arraj was appointed Special Master on August 10, 1978, for the purpose of taking evidence and making recommendations based on that evidence. His Report dated August 20, 1979, was ordered filed on October 1, 1979, at which time the Court directed the filing of any exceptions within 45 days.

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[3]The Court has retained jurisdiction throughout this litigation, primarily for this purpose. *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 382 U.S. 448 (1966) (First Supplemental Decree, implementing the 1965 decision); *United States v. California*, 432 U.S. 40 (1977) (Second Supplemental Decree); *United States v. California*, 436 U.S. 32 (1978); and *United States v. California*, ... U.S. ...., 99 S.Ct. 556 (1978) (Third Supplemental Decree, implementing the 1978 decision).

The State of California accepts all of the Special Master's recommendations except that with respect to the sixteen piers. In this memorandum we address only that recommendation, deferring argument in support of the remainder of the Master's Report until our response to the Government's exceptions, if any.

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To a far greater extent than on the Atlantic seaboard,[4] shoreline piers serving as military and commercial ports and for recreation have been fixtures on the coast of California virtually since its annexation from Mexico. Their existence is due to a lack of fully enclosed natural harbors on California's one thousand-mile coast line, a characteristic first recorded by Richard Henry Dana in 1841:

> "This wind (the south-easter) is the bane of the coast of California. Between the months of November and April, (including a part of each,) which is the rainy season in this latitude, you are never safe from it, and accordingly, in the ports which are open to it, vessels are obliged, during these months, to lie at anchor at a distance of three miles from the shore, with slip-ropes on their cables, ready to slip and go to sea at a moment's warning. The only ports which are

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[4]There are many piers on the California coast other than the sixteen which are the subject of this petition; because of a nearby cape or coastal structure these other piers would have no effect on the Submerged Lands Act boundary if treated as part of the coast. The Port San Luis, Stearns Wharf and Santa Monica Piers are examples. *See* Defendant's Exhibit GG, Tr. Denver Hearings, p. 232.

> safe from this wind are San Francisco and Monterey in the north, and San Diego in the south."[5]

(All but one of the sixteen piers that are the subject of the Special Master's Report lie south of Monterey.) Until the building and dredging of artificial harbors, not begun for nearly one hundred years after Dana wrote, coastal piers extending beyond the surf zone into deep water served as the principal ports of Southern California. And as the Special Master found, a number of these piers still serve as ports.[6]

During the 1860's, piers on San Pedro Bay were the shipping ports for Los Angeles, San Bernardino and Arizona. These piers included Timms Landing, wharves at Wilmington, and Anaheim Landing on the eastern side of the Bay.[7] The 1870's saw major pier construction at other points on the Southern California coast to handle an increasing volume of shipping and particularly to facilitate the transfer of cargo and passengers from ship to rail, and vice-versa. The Port San Luis Pier was built in 1872, as was the Stearns Wharf in Santa Barbara, both of which are still in existence and use today. The Port Hueneme Pier was built just prior to 1872.[8]

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[5]Dana, Two Years Before the Mast 57 (B. F. Collier & Son 1969). This observation was also made by the first Special Master in this case. *See* Report of Special Master William H. Davis, *United States v. California*, (then) No. 6 Original, October 14, 1952, p. 47. *See also* House of Representatives Report No. 2515, 82d Congress, 2d Sess., p. 19 (1952).

[6]Report of the Special Master, p. 7 n. 7, p. 21.

[7]Bancroft's Works, Vol. XXIII, History of California, Vol. VI, at 522 (1888); Davidson, Coast Pilot of California, Oregon and Washington 36-37 (4th ed. 1889); Newmark, Sixty Years in Southern California 366 (N.Y. 1926); Marquez, Port Los Angeles: A Phenomenon of the Railroad Era 1 (San Marino 1975).

[8]Tr. Denver Hearings, pp. 261-263, 296-297.

By acquiring the Wilmington piers and the Los Angeles and San Pedro Railroad, the Southern Pacific Railroad in 1872 obtained a virtual monopoly over all shipping to and from Los Angeles that was not first challenged until 1875. In that year, United States Senator John P. Jones of Nevada built a pier 1,740 feet long on the shore of Santa Monica Bay, at a site four miles closer to Los Angeles than the Southern Pacific's terminal piers at Wilmington on San Pedro Bay. Jones' Los Angeles & Independence Railroad made its maiden run between Santa Monica and Los Angeles in October, 1875, and was planned to extend to Salt Lake City. The depression of 1876, however, and rate-cutting competition by the Southern Pacific forced Jones to sell the pier and railroad to the Southern Pacific in June, 1877. But the episode began a long dispute over the appropriate site for the Port of Los Angeles. The maneuvers of protagonists seeking to establish a particular site as the Port of Los Angeles began several decades of bustling pier construction on the Southern California coast.[9]

In 1887, Port Ballona, a pier about two-thirds downcoast from Point Dume on Santa Monica Bay, was opened as the ocean terminus of the California Central Railroad.[10] The following year McFadden's Wharf was built just south of San Pedro Bay; now known as the Newport Beach Pier, it is one of the sixteen that are the subjects of the present proceeding. In 1890 the Redondo Railway Co. built the first

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[9]Ingersoll, Century History of Santa Monica Bay Cities 144-45 (Los Angeles, 1908); Willard, The Free Harbor Contest at Los Angeles 63 (Los Angeles, 1899); Marquez, *supra*, n. 7, pp. 3-24.

[10]Newmark, *supra*, n. 7, p. 581.

pier at Redondo Beach on Santa Monica Bay, and connected it by rail to Los Angeles. The Santa Fe Railroad immediately followed suit with a railroad pier of its own at Redondo.[11] By 1892, it was estimated that more than sixty per cent of all water traffic in and out of Los Angeles, if coal and lumber were excluded, was passing across the Redondo piers.[12]

By 1890, the Southern Pacific and its new president, Collis Huntington, were losing control of San Pedro Bay. Lands there were being acquired by persons thought to be agents for the Union Pacific, and the Southern Pacific turned its attention to Santa Monica Bay. While Southern Pacific's existing wharves in San Pedro Bay were kept in repair, and a few new ones built, the Railroad began construction of the massive Long Wharf at Santa Monica in January 1892. When completed in 1893, this pier extended 4720 feet into the Bay and supported two railroad tracks that fanned into seven at pier-head. The pier-head in addition supported 380 frontage feet of depot buildings. Aside from its rail and vessel traffic, the pier attracted tourists who could walk its entire length, dine in its restaurant, and fish for yellowtail tuna and halibut.[13]

Shortly thereafter, three of the sixteen piers that are the subjects of these cross-motions were constructed. Ocean-

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[11]Tr. Denver Hearings, p. 305-306; Marquez, *supra*, n. 7, p. 32.

[12]Willard, *supra*, n. 9, p. 64; Mayo, Los Angeles 113 (N.Y., 1933).

[13]Ingersoll, *supra*, n. 9, pp. 187, 203; Willard, *supra*, n. 9, pp. 61, 66-69; Newmark, *supra*, n. 7, p. 468; Bartlett, "The Battle for Southern Pacific Ports," Westways 26-29 (August, 1935); Warren, History of the Santa Monica Bay Region 54, 61 (Santa Monica, 1934); Marquez, *supra*, n. 7, pp. 36-63.

side Pier was built in 1896, Huntington in 1904, and Balboa approximately 1907.[14]

The preeminence of these piers as the major shipping ports of Southern California declined in the early part of the twentieth century. By 1900 the "Free Harbor" forces had persuaded Congress that San Pedro Bay, and not Santa Monica Bay, was the better site for the Port of Los Angeles. With the construction of the outer breakwater in San Pedro Bay, major commercial shipping tended to concentrate there. The piers at other points on the Southern California coast became subsidiary ports for fishing vessels and those engaged in minor coasting trade, such as lumber.[15]

Oil production off the Southern California coast, however, created a new use for piers beginning in the 1930's. Today the Ellwood, Carpinteria, Morro Strand, Punta Gorda-Rincon, and Port Orford piers are used as ports by vessels engaged in offshore oil production.[16]

During World War II, the Coast Guard occupied all the piers on the open California coast. Some were used as landing places for offshore patrol vessels; others were placed under guard to prevent their use by enemy ships.[17]

With the construction of small-craft harbors in the last several decades,[18] the need for piers as landing places has

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[14]Tr. Denver Hearings, p. 262.

[15]Tr. Denver Hearings, p. 298; Marquez, *supra*, n. 7, pp. 82-89.

[16]Report of the Special Master, pp. 20-21; Tr. Denver Hearings, pp. 223-224, 299-302, 373-374. Defendant's Exhibit I, Tr. Denver Hearings, p. 8.

[17]Tr. Denver Hearings, pp. 303-304.

[18]*See*, e.g., the projects listed in Defendant's Exhibit Z, pp. 4-6, Tr. Denver Hearings, p. 199.

diminished and their use for recreation has increased. The example of the Santa Monica Long Wharf, which was immensely popular in the nineteenth century as a fishing and promenade pier, has been followed by several of the piers that are the subject of the present petitions. These include piers at Imperial Beach, Ocean Beach, Oceanside, Newport (McFadden's Wharf), Huntington, Balboa, Hermosa, Venice and Manhattan Beach. While several of these piers are still used as landing points for vessels, they are primarily recreational piers.[19] One reason piers on the California coast have remained so popular as recreational facilities is a national policy, begun in the 1930's, of encouraging the use of our coasts for recreation.[20] Yet as the uses of these piers have changed in the past, changing social or economic conditions may require different uses in the future. In March, 1979, for example, a massive landslide buried the Pacific Coast Highway near Malibu on Santa Monica Bay. Two recreational piers, the Malibu and the Santa Monica, were pressed into service as ferry ports, saving ferry passengers a twenty-five mile highway detour. Conversion of a strictly recreational pier to a ferry port, or to a military port in a period of emergency, can be effected in a matter of days.[21]

The Special Master found that "[n]one of the piers in question is part of a harbor or harbor system . . . because none of the piers provides an anchorage sheltered from

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[19]Report of the Special Master, p. 21. Tr. Denver Hearings, pp. 316-318.

[20]Tr. Denver Hearings, p. 317; *see*, e.g., Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

[21]Tr. Denver Hearings, pp. 301-302.

weather conditions on the open sea." Report of the Special Master, p. 28. He defines a port as ". . . . any place where passengers or cargo may be transferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe anchorage and sheltering for boats from weather conditions prevailing on the open sea." Reports of the Special Master, p. 7, n. 7. It is true that none of the piers lies in an area of fully enclosed protection from the elements. But all are built in areas of partial protection. While a fully enclosed harbor such as San Diego or San Francisco provides the optimum haven from the elements, the Southern California coast nonetheless provides a substantial protection to vessels lying alongside piers on the open coast. This protection is afforded by several features. The general alignment of the coast south of Pt. Conception serves as a shield against the prevailing northwest winds. The Channel Islands offshore act as massive breakwaters and submarine canyons along the coast dissipate the energy of approaching waves. These features are sufficient to afford safe berthing at the piers approximately 330 days a year. The alignment of the offshore islands, however, leaves the coast generally unprotected during the "southeasters" described by Dana.[22]

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[22]Tr. Denver Hearings, pp. 304-306, 375-376; Ingersoll, *supra,* n. 9, p. 121 (Santa Monica Bay); Davidson, Directory for the Pacific Coast of the United States, Report to the Superintendent of the U.S. Coast Survey 15-16 (1862) (Santa Barbara-Ventura coast). "The islands break the force of the large westerly swell of the Pacific along the coastline, and in winter afford good lee from the full force of the southeast gales." Davidson, Coast Pilot of California, Oregon and Washington 53-54 (4th ed., 1889). "San Pedro Bay is well protected in every direction, except against the winter gales from the southeast round to the southwest. During the spring, summer and autumn months, it is an excellent roadstead. It is

SUMMARY OF ARGUMENT

This Court has established unequivocal principles for determing what coastal installations shall be regarded as "artificial extensions" of the coast line for purposes of the Submerged Lands Act. These principles provide, for example, that such structures as jetties, breakwaters and groins are to be so regarded. *United States v. California,* 432 U.S. 40, 41-42 (1977). And when they are applied to the facts of the present case, these principles confirm that the sixteen piers are likewise artificial extensions of California's coast line.

The Special Master, however, did not apply the plain principles this Court has established. In his recommendation to this Court he relies instead explicitly on a test which this Court has not considered, much less adopted. Report of the Special Master, p. 26. Ironically, earlier in his Report he rejects a principle urged by the United States, precisely because it "ignores the framework" of this Court's prior decisions. Report of the Special Master, p. 8.

When the sixteen piers are considered in the light of the principles established by this Court, it is clear they are to be regarded as parts of California's "coast line" for purposes of the Submerged Lands Act. This Court has decreed that the "coast line" is to be taken as "modified" or "extended" by artificial structures, as well as by natural changes. *United States v. California,* 382 U.S. 448, 449,

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nearly free from dangers, and there is nothing to be feared outside of a quarter of a mile from the shoreline in the bay or approaches." *Id.* at 38. The waters of Santa Monica Bay are sufficiently calm that a gambling ship, "The Rex," having no motor power, lay anchored within the bay more than four miles from nearest land, for five or six years. *People v. Stralla,* 14 Cal. 2d 617, 625; 96 P. 2d 941, 944 (1939).

451 (1966); *United States v. California, supra,* 432 U.S. at 41-42. Furthermore, it has directed that the principles contained in the Convention on the Territorial Sea and the Contiguous Zone be employed in ascertaining the meaning of the expression "coast line" as used in the Submerged Lands Act. T.I.A.S. No. 5639; 15 U.S.T. (Pt. 2) 1606 ("the Convention"). *United States v. California,* 381 U.S. 139, 165 (1965). Specifically, the Court has decreed that "artificial modifications" of the coast line include "outermost permanent harbor works" within the meaning of Article 8 of the Convention. *United States v. California, supra,* 382 U.S. at 449. Article 8 provides that port facilities are to be regarded as parts of the coast, and five of the California piers, as the Special Master found, are port facilities. Moreover, as this Court has recognized, Article 8 "expressly covers artificial structures which are not closely linked to ports," providing certain criteria are met. All of the piers meet these criteria: They are permanent structures, connected to the coast, and not of excessive length. (A seven-mile-long pier in the Persian Gulf is the most frequently cited example of an excessively long coastal structure; the longest pier in issue, Ocean Beach, is 3500 feet. Report of the Special Master, p. 21.)

Significantly, this Court has decreed a variety of coastal structures to constitute artificial extensions of the coast. *United States v. California, supra,* 432 U.S. at 41-42. Some of these structures are port facilities, some are "coast protective works," and others serve purposes unrelated to navigation or coastal maintenance. As do the sixteen piers, however, all of these structures possess the attributes required by the prior decisions of this Court.

Article 3 of the Convention corroborates the result obtained by employing the principles of Article 8 and the Court's decrees. It establishes that the sixteen piers are parts of the "normal baseline" from which the extent of the territorial sea, and hence of the operation of the Submerged Lands Act, is to be measured.

The Special Master chose not to rely on the foregoing principles, but instead on a test suggested by two writers in 1965. That test, however, was designed not for structures erected *on* the coast, but specifically for offshore installations. Adoption of such a new test would seem clearly to invite additional litigation in the submerged-lands cases, but in this case it is clear that the sixteen piers meet the authors' suggested criterion.

Had there been a need to look beyond the principles established by this Court and the Convention, it would have been far more appropriate to consult our domestic jurisprudence, which has consistently treated piers as parts of the coast for admiralty purposes. For the drafters of the Submerged Lands Act clearly contemplated that questions of interpretation would be governed by domestic and not international law. Moreover, the Special Master could have consulted three publications of the State Department, expressing the view that piers are to be regarded as parts of the coast.

ARGUMENT

I

THIS COURT HAS ESTABLISHED THAT PORT FACILITIES AS WELL AS "STRUCTURES NOT CLOSELY LINKED TO PORTS," IF PERMANENT AND CONNECTED WITH THE MAINLAND, ARE TO BE REGARDED AS PARTS OF THE COAST. UNDER THESE PRINCIPLES, THE SIXTEEN PIERS CONSTITUTE PARTS OF CALIFORNIA'S COAST.

A. The Principles Established by This Court for Determining the Status of Coastal Installations Derive Primarily from Two Provisions of the Convention on the Territorial Sea and the Contiguous Zone, Article 3 and Article 8.

In past decisions this Court has made clear that port facilities are to be treated as parts of the coast line for purposes of the Submerged Lands Act. *See*, e.g., *United States v. California*, 382 U.S. 448, 449, 450, paras. 2, 4(b); *cf. United States v. Louisiana*, 394 U.S. 11, 49-50 fn. 64 (1969).

In addition, this Court has held that "structures not closely linked to ports" are to be regarded as parts of the coast if they are "permanent" and connected with the mainland. *United States v. Louisiana*, 394 U.S. 11, 49-50 fn. 64, 36-37. (A possible third requirement, a prohibition against excessive length, is discussed below but is not of concern here, since none of the structures has such a length. *See infra*, pp. 26, 29.) In accordance with these criteria, this Court has held a number of coastal installations not related to ports to constitute artificial "modifications" or "extensions" of the coast line, including structures denominated

"jetties" and "groins." *See,* e.g., *United States v. Louisiana, supra,* 394 U.S. at 49-50 fn. 64; *United States v. California,* 432 U.S. 40, 41-42 (1977); Tr. Denver Hearings, pp. 220, 234, 292.

Each of the sixteen piers on the California coast meets one or both criteria. Five are port facilities, as the Special Master found. These are the Ellwood, Carpinteria, Morro Strand, Port Orford, and Rincon Island-Punta Gorda facilities. Report of the Special Master, pp. 7 n. 7, 20-21. And all are permanent structures connected with the mainland, serving as extensions of the coast into the sea for port, recreation and other purposes. Report of the Special Master, pp. 21, 27 n. 21.

The Special Master apparently felt this Court's criteria inadequate for determining whether the piers are artificial extensions of the coast line, for in his recommendation he relied instead on another test, one which has not been recognized by this Court. Report of the Special Master, p. 26. For this reason this Court's past decisions, and particularly the bases for them, bear examination.

The principles which this Court has established governing what coastal installations shall be regarded as parts of the coast line have been taken primarily from the Convention on the Territorial Sea and the Contiguous Zone. In discussing the meaning of "coast line" as used in the Submerged Lands Act, this Court held in 1965:

> "Had Congress wished us simply to rubber-stamp the statements of the State Department . . . it could readily have done so itself. It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best

> and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone . . . provides such definitions. We adopt them for purposes of the Submerged Lands Act." *United States v. California*, 381 U.S. 139, 165 (1965) (footnotes omitted).

Two provisions of the Convention, Article 8 and Article 3, establish that the sixteen piers, just as the jetties, groins and breakwaters, are parts of California's coast line for purposes of the Submerged Lands Act.

B. Article 8 Establishes That Port Facilities as Well as Installations Not Related to a Port or Harbor, if They Are "Permanent Structures Erected on the Coast and Jutting out to Sea," Are to Be Regarded as Forming Parts of the Coast.

Implementing its 1965 decision that the definitions contained in the Convention on the Territorial Sea and the Contiguous Zone are adopted for purposes of the Submerged Lands Act, this Court decreed in 1966:

> "[t]he coast line is to be taken as heretofore or hereafter modified by natural or artificial means, *and includes* the outermost permanent harbor works that form an integral part of the harbor system *within the meaning* of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone. . . ." *United States v. California*, 382 U.S. 448, 449 (1966). (Emphasis added.)

Article 8 is the primary provision of the Convention addressing the status of installations built into the sea from the mainland: Are they to be regarded as structures

within the territorial sea, or as parts of the coast such that the territorial sea is measured from the seaward ends of the structures?

The principal focus of the article, as one would expect, is ports. The initial concern of its drafters, the members of the International Law Commission, was to assure that port and harbor facilities were regarded as parts of a nation's coast. Entitled "Ports" by the ILC, the text of Article 8 provides:

> ". . . [T]he outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

But as discussions leading to the adoption of the Article progressed, the subject of coastal installations not related to a port or harbor was raised. The Commission decided that these also should be treated as parts of the coast. This question of non-port-related structures was not of the utmost importance to the Commission, which was addressing such historic matters as the breadth of the territorial sea and rights in the continental shelf. But the subject was sufficiently important that the Commission's rule was incorporated into its official Commentary to Article 8. The second paragraph of that Commentary provides:

> "Permanent structures erected on the coast and jutting out to sea (*such as* jetties and coast protective works) are *assimilated* to harbour works."[23] (Emphasis added.)

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[23]Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN. 4/SER. A/1956/Add. 1.

This Court has recognized that in ascertaining the "meaning" of Article 8, as the 1966 decree herein requires, the official Commentary is a principal aid. In fact the Court has made specific reference to the paragraph of the Commentary quoted above, holding that the Article "expressly covers artificial structures which are not closely linked to ports." *United States v. Louisiana, supra,* 394 U.S. at 50 n. 64. Accordingly, this Court has held a number of "permanent structures erected on the coast and jutting out sea" to constitute artificial modifications or "extensions" of the coast line. In *United States v. California, supra,* 432 U.S. at 41-42, for example, a number of coastal installations were decreed to be "artificial extensions" of California's coast line. Some are port facilities, some are coast protective works, and others fall in neither category"[24]

As we demonstrate below, the five piers that are port facilities constitute parts of the coast within the express meaning of Article 8. And all of the piers are "permanent structures erected on the coast and jutting out to sea." Thus even those of the sixteen piers "not closely linked to ports" are "assimilated" to "harbour works" and are to be regarded as forming part of the coast.

The International Law Commission, which drafted the Convention on the Territorial Sea and the Contiguous Zone, was formed pursuant to Article 13 of the United Nations Charter, which mandates the General Assembly to "initiate studies and make recommendations for the purpose of encouraging the progressive development of

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[24]*See* Tr. Denver Hearings, pp. 210-211, 220, 233-234, 292; and see photographs in Defendant's Exhibit GG.

international law and its codification." The Commission was created by General Assembly Resolution 174 (II) on November 21, 1947, to fulfill this mandate, and was charged specifically with the codification and development of international law. At its first session in 1949, the Commission selected the regime of the territorial sea as a topic for consideration, and work on this subject was begun in 1952. *See* 1 Shalowitz, Shore and Sea Boundaries, 203 *et seq.* (1962).

The significance of the official Commentary to Article 8, and of the Article's "preparatory work" in general, should be emphasized. Professor Briggs, noting that the statute creating the International Law Commission requires it to prepare and submit Commentaries together with the text of articles, writes: "[T]he commentaries, as well as the black-letter texts, set forth the Commission's views. In fact, the commentaries not only interpret, but sometimes qualify the text of articles to which they are appended, and both text and commentary are adopted by the Commission prior to their reference to the General Assembly."[25] The preparatory work or "legislative history" of Article 8 is also significant in ascertaining the "meaning" of the article. This Court has made frequent use of the preparatory work of treaties, including that of the Convention on the Territorial Sea and Contiguous Zone.[26]

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[25]Briggs, The International Law Commission 189 (1965). *See* Jessup Memorandum, Defendant's Exhibit C, pp. 23-24, Tr. N.Y. Hearings, pp. 8-9.

[26]*United States v. Louisiana, supra,* 394 U.S. at 43 n. 53, 45 n. 58, 55, 56. *See also Kinkhead v. United States,* 150 U.S. 483, 486 (1893); *United States v. Texas,* 162 U.S. 1, 23-28, 36-38 (1896); *Oklahoma v. Texas,* 260 U.S. 606, 632 (1923); cases collected in 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States § 533 D., at 1482-83 (2d rev. ed. 1945).

Judge Philip C. Jessup provided testimony for the Special Master during the New York hearings in the form of a memorandum which dealt at length with the Commentary and the preparatory work pertaining to Article 8. This memorandum should be consulted for a full exposition of those subjects.[27] Certain highlights however are presented here. They demonstrate that the drafters of the Convention clearly contemplated that such structures as the sixteen California piers were to be regarded as forming parts of the coast.

Early efforts toward codification of the law of the sea, though unsuccessful, provided a basis for the later work of the International Law Commission. The League of Nations Preparatory Committee in 1929 considered the status of ports, and drafted Basis of Discussion No. 10, which was adopted the following year by the Second Committee of the 1930 League of Nations Codification Conference. It reads:

> "In determining the breadth of the territorial sea, in front of ports the outermost permanent harbour works shall be regarded as forming part of the coast."[28]

The Report of the Second Committee referred to "outermost permanent harbor works" as "outermost fixed works," showing that the Conference meant the word "permanent"

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[27]Jessup Memorandum, Defendant's Exhibit C, pp. 38-52. Judge Jessup's distinguished career in international law need not be recounted here. A summary is contained in Defendant's Exhibit A, Tr. N.Y. Hearings, p. 5. *See also* the bibliography and testimonials in Volume 62 of the Columbia Law Review, Defendant's Exhibit B, Tr. N.Y. Hearings, pp. 6-7.

[28]League of Nations, Report of the Second Committee, Conference for the Codification of International Law, The Hague, 1930, C.230.M.117.1930.V., p. 12.

to connote fixed, immoveable structures as opposed to floating structures.[29] Professor Gidel, the delegate from France who conceived the term "fixed works," wrote four years later that the expression included such structures as "breakwaters, jetties, *piers*, etc."[30] (Emphasis added.)

Such early efforts at codification, insofar as they addressed the question of coastal structures, addressed them largely in the context of ports. The question of coastal structures not strictly associated with ports appears not to have been given extensive consideration. But this situation began to change when the International Law Commission in 1952 commenced its work on the subject of ports, which led to the drafting of what became Article 8. Its discussions, and ultimately its official Commentary show that the Commission gave the question thoughtful consideration.

The Commission took the League of Nations proposal with respect to ports as its starting point, and its first two years of discussions were largely confined to port facilities as such. On July 1, 1954, however, the Commission discussed the status of jetties (which are frequently unconnected with a port or harbor[31]), dykes used to harness tidal energy, and other structures not related to ports or

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[29] *Id.*

[30] 3 Gidel, Le Droit International Public de la Mer 524-25 (1935) ("*môles, jetées, encrochements,* etc." The French *jetée* means pier, just as "jetty" in British usage means pier. Report of the Special Master, p. 27; Jessup Memorandum, Defendant's Exhibit C, pp. 3-11.

[31] A number of jetties which have been decreed parts of California's coast line, for example, have no connection with a port or harbor, nor are they "coast protective works." *United States v. California, supra,* 432 U.S. at 41-42; Tr. Denver Hearings, pp. 220, 234, 292.

harbors.[32] While some members of the Commission favored treating such coastal installations in a separate article, the subject instead was treated in the form of this "comment" to Article 8 in the report covering the work of the ILC's 6th Session, June 3-July 29, 1954:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) are assimilated to harbour works."[33]

This view that permanent structures erected on the coast be assimilated to "harbour works," even if not connected with a port or harbor, did not thereafter change, and became embodied in the Commission's official "Commentary" to Article 8 in 1956.

As the work of the International Law Commission continued over the next two years, discussions of coastal structures recurred on several occasions, largely in the context of concern over excessively long structures. The example of a seven-mile long *pier* in the Persian Gulf was most frequently used. The United Kingdom raised the point respecting this pier in 1955.[34] Mr. Francois, the Special Rapporteur, again raised the matter of the seven-mile pier later in 1955, but reported, "The case seemed too special

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[32]Summary Records of the 6th Session, [1954] 1 Y.B. Int'l L. Comm'n 88, U.N. Doc. A/CN.4/SER. A/1954.

[33]Report of the International Law Commission to the General Assembly, 9 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 155, U.N. Doc. A/CN.4/SER. A/1954/Add. 1.

[34]Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9), Annex (Item 16), U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Comm'n 58, U.N. Doc. A/CN.4/SER. A/1955/Add. 1.

to warrant the Commission's amending the general principle it had adopted."[35] The United Kingdom representative then remarked:

> ". . . *The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline;* it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf [*i.e.*, the seven-mile pier, ought to be treated differently]."[36] (Emphasis added.)

The subject was mentioned several times during the Commission's work in 1956.[37] Sir Gerald Fitzmaurice of the United Kingdom again remarked:

> "Piers projecting from the land up to a certain point might reasonably be regarded as part of the land, but if they extended several miles into the high seas, their situation would be similar to that of artificial constructions in the sea, and it was arguable that they should not be regarded as part of the coast, but as erections in the high seas."[38]

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[35]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER.A/1955.

[36]*Id.* at 74. The italicized portion of this passage was quoted in *United States v. Louisiana, supra,* 394 U.S. at 37 n. 42.

[37]Regime of the High Seas and Regime of the Territorial Sea, Comments by Governments, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CN.4/99/Add. 1 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 26, 85, U.N. Doc. A/CN.4/SER.A/1956/Add. 1.

[38]Summary Records of the 8th Session, [1956] 1 Y.B. Int'l L. Comm'n 193, U.N. Doc. A/CN.4/SER.A/1956.

The Commission then agreed that a reference to Sir Gerald's remarks would be included in the report.[39] That reference took the form of the third paragraph of the Commission's official Commentary to Article 8 as the article was reported to the General Assembly. The full Commentary reads as follows:

"Ports"

• • •

"(1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State. No rules for [the internal waters of] ports have been included in this draft, which is exclusively concerned with the territorial sea and the high seas.

"(2) *Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.*

"(3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article could still be applied or whether it would not be necessary, in such cases, to adopt the system of safety zones provided for in article 71 for installations on the continental shelf. As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion."[40] (Emphasis added.)

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[39] *Id.*

[40] Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add. 1.

(As Judge Jessup observed, in British usage the word "jetty" includes "pier."[41] That British and not American usage was employed in the Commentary is apparent from the spelling of "harbour" and "kilometres" and from the fact that the third paragraph, which uses as an example a "jetty," was the product of discussion concerning a seven-mile-long *pier*.)

The ILC text was taken up by the United Nations Conference on the Law of the Sea at Geneva in 1958. Prior to the final vote Mr. Francois, the Special Rapporteur, stated that "the Commission had deliberately drawn the provision [of Article 8] in mandatory terms in order to eliminate every shadow of doubt."[42] Article 8 as drafted by the International Law Commission was adopted April 29, 1958, by a vote of seventy to none, with one abstention.[43] It was signed by the President of the United States on March 24, 1961, and was entered into force on September 10, 1964.[44]

One additional point concerning the "meaning" of Article 8 ought to be made. The distinction between a port and a harbor made by the Special Master (Report, p. 7 n. 7), while correct from an engineering viewpoint, is immaterial to the meaning of Article 8. The International Law Commission's deliberations leading to the adoption of

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[41]Jessup Memorandum, Defendant's Exhibit C, pp. 4-8.

[42]III Official Records, U.N. Conference on the Law of the Sea, First Committee (Territorial Sea and Contiguous Zone), 142, U.N. Doc. A/CONF. 13/39 (1958).

[43]*Id.* at 141-42; 4 Whiteman, Digest of International Law 263 (1965).

[44][1964] 15 U.S.T. (Pt. 2) 1606.

Article 8 were undertaken initially in the context of "ports." While the English text of Article 8 speaks of "harbour works" and "harbour system," the Commission titled the article "Ports." The first paragraph of the Commentary refers to the "installations" of a "port." Moreover, the French text of the article, which is equally authoritative with the English,[45] speaks of the "permanent installations" (*"installations permanentes"*) of a "port system" (*"systeme portuaire"*).[46] Thus "harbour works," as used in its primary (*i.e.*, not "assimilated") sense, denotes harbor as well as port facilities. (Nevertheless, it might be noted, each of the piers is built in an area of substantial protection from the elements, thus constituting works within a "harbor." *See supra,* pp. 11-12.)

The five piers that constitute port facilities, then, are to be "regarded as forming part of the coast" by the express terms of the text of Article 8. Moreover, the preparatory work and the official Commentary to Article 8 make clear that those piers "not closely linked to ports," in the words of this Court, are to be "assimilated" to harbor works and similarly regarded as forming part of the coast. For each of the piers meets this Court's and the Convention's criteria:

(1) Each is connected with the mainland ("[p]ermanent structures erected *on* the coast and jutting out to sea . . ."). This requirement was recognized by the Court in *United States v. Louisiana, supra,* 394 U.S. at 37 (1969). In con-

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[45]Article 32 of the Convention. *See* Jessup Memorandum, Defendant's Exhibit C, pp. 30-32.

[46]Jessup Memorandum, Defendant's Exhibit C, pp. 30-32; [1964] 15 U.S.T. (Pt. 2) 1617.

trast, an artificial island detached from the coast may not be used as a point from which to measure the territorial sea by the terms of Article 10 of the Convention.

(2) Each is "permanent," as found by the Special Master. Report of the Special Master, p. 27 n. 21.

(3) None is of excessive length, a characteristic which would probably disqualify a structure from being treated as part of the coast. The caution expressed in paragraph 3 of the Commentary to Article 8 refers to a structure several kilometers long. The length of the longest pier in issue is 3,500 feet.

C. Article 3 Confirms the Result Obtained by Employing Article 8: The Piers, Being Parts of the Low-Water Line on the Government's Official Charts, Are Thus Parts of the "Normal Baseline" from Which the Breadth of the Territorial Sea is Measured.

Article 3 of the Convention leaves no question that the sixteen piers are to be regarded as parts of California's coast. It provides:

> ". . . [T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast *as marked on large-scale charts officially recognized by the coastal State.*" (Emphasis added.)

On every chart of the California coast "officially recognized" by the United States, in accordance with one hundred years of standard American charting practice, the sixteen piers are marked as parts of the low-water line. Article 3 thus provides that they are parts of the "normal baseline" (in terms of the Submerged Lands Act, the "coast line") from which the extent of the territorial sea,

and hence of the operation of the Submerged Lands Act, is to be measured.[47]

The charts of the American coast officially recognized by the United States are those published by the National Ocean Survey ("NOS"). *See,* e.g., Defendant's Exhibits AA through FF, HH and LL; Tr. Denver Hearings, pp. 232, 253. As Dr. Hodgson, The Geographer of the Department of State, testified for the United States, the low-water line referred to in Article 3 is represented on these charts by a solid black line.[48] The piers are included within this line, a fact that can be observed from the Government's charts, on which witnesses have identified them. *See* Exhibits AA through DD.

Significantly, the low-water line on the Government's charts follows the configuration of piers just as it does other structures, such as groins and breakwaters, that extend the coast line into the sea. And these latter structures are *conceded* by the United States to be parts of the coast line precisely because of Article 3. Dr. Hodgson testified for the Government that structures such as groins are treated as parts of the coast by virtue of Article 3, that is, since they are represented by the same solid black line that represents other segments of the low-water line along

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[47]The word "normal" is used to distinguish this standard baseline from the "straight baseline," which by Article 4 is permitted where for example a fringe of islands parallels the coast. *See generally,* 4 Whiteman, *supra* at 181-86. The United States has refused to adopt a system of straight baselines for American coasts. *See United States v. California, supra,* 381 U.S. at 166-69.

[48]Defendant's Exhibit U-1, p. 33, lines 20-21; Tr. Denver Hearings, p. 23.

the coast.[49] Another Government witness testified that breakwaters also are considered parts of the coast by virtue of Article 3, because they are marked as parts of the low-water line on the official Government charts.[50] On the Government's charts, Exhibits AA through DD, witnesses have identified, in addition to the piers, a number of such groins and breakwaters which this Court has decreed to constitute parts of California's coast line under the Submerged Lands Act. *United States v. California, supra,* 432 U.S. at 41-42 (Second Supplemental Decree). One can observe that just as these structures are shown as parts of the low-water line along the coast, so are the piers. Article 3 clearly mandates that the piers be treated as parts of the coast line.

Significantly, American charting practice has consistently treated piers as well as other coastal structures as parts of the coast line. Mr. Shalowitz provides illustrations of the historical treatment of coastal structures in Volume 2 of his work, Shore and Sea Boundaries, *supra.* On page 198, piers are shown as extensions of the coast line in the third diagram from the top on the left of the page. The diagrams are captioned "Conventional symbols used in 1860." The 1865 chart reproduced on page 200 shows wharves within what is labeled "Inner Harbor," and also a structure labeled "Fox's Wharf" on the right side of the

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[49]Defendant's Exhibit U-1, p. 131, lines 1-4. If the scale of the chart is sufficiently large, the structure will be shown with a double solid line. *See, e.g.,* the groin shown on the far left side of NOS Chart 18754, Exhibit QQ, Tr. Denver Hearings, p. 420. At a smaller scale the structure will be depicted by a single solid black line. *See, e.g.,* the groins and jetties circled on Exhibit DD.

[50]Testimony of Elihu Lauterpacht, Tr. N. Y. Hearings, pp. 186-187.

chart. Each is depicted as an extension of the coast line. On page 248 Mr. Shalowitz speaks of the "present requirement (in 1963)," and refers to Figure 62 on the opposite page. There, under "Piers and waterfront areas," the coast line is shown as extending into the sea, by either a double or single black line, to depict a pier. (The reference in the text to the use of orange for the low-water line is applicable only to the hydrographic-survey sheets, which Dr. Hodgson explained are those from which the actual nautical charts, such as Exhibits A A through FF, are compiled.[51])

The rule of Article 3 is a sound one. It enables the mariner at sea to determine with certainty whether he is within or without the territorial waters of the coastal nation. He can compute his position with respect to a coastal installation shown on his charts without being expected to divine whether the facility is considered a "pier," a "jetty" or a "groin" by the coastal state. The point of view of the mariner has historically been a fundamental concern in issues of delimiting the territorial sea. S. Whittemore Boggs, formerly The Geographer of the State Department, wrote: "If the territorial sea is to be limited in a manner to occasion the least possible interference with navigation, it will be necessary *to assume the viewpoint of one who is on the sea* and who wishes to know where territorial waters begin." (Emphasis in the original.)[52]

The Special Master notes that the United States on certain of its charts (Exhibits AA through DD) has under-

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[51]Tr. Denver Hearings, pp. 183-184.

[52]Boggs, Delimitation of the Territorial Sea, 29 Am. J. Int. L. 541, 543 (1930). *See also* 1 Shalowitz, *supra* at 273.

taken to show the "three-mile line" offshore and that in instances it has measured this line from the seaward ends of piers. Report of the Special Masters, p. 25. This fact is entirely irrelevant in employing Article 3.[53] How the three-mile line may or may not be shown on a chart is not what Article 3 addresses. Rather it addresses how the *low-water* line along the coast is shown. And on every official Government chart of the California coast produced during the hearings before the Special Master, each of the sixteen piers is marked as part of the low-water line along the coast.

The sixteen piers then are parts of the "normal baseline" within the meaning of Article 3. From this baseline, the boundaries of the territorial sea, and those of the submerged lands quitclaimed to California, are to be measured.

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[53]California had called the Special Master's attention to these four charts, simply to demonstrate the soundness of the rule of Article 3. The "poor drafing" the Special Master speaks of (referring to the drawing of the three-mile line, not the coast line) was explained by the United States to be due at least in one instance to the fact that one cannot distinguish a breakwater from a pier on the charts. Tr. Denver Hearings, pp. 391-395. Certainly this Court cannot expect more of the mariner at sea than of the Government's cartographers.

It should be noted too that the United States is one of very few nations that have depicted on charts the boundaries of territorial waters. Deposition of Robert D. Hodgson, The Geographer, Department of State, Defendant's Exhibit U-1, p. 85, lines 9-16. For the California coast it has done so only on a series of small-scale charts. These are Exhibits AA through DD, all at scales smaller than 1:200,000. The mariner of course must rely on the large-scale charts to which Article 3 refers, such as Exhibit LL, whose scale is 1:12,000.

II

THE SPECIAL MASTER NEED NOT HAVE LOOKED BEYOND THE PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING WHAT COASTAL INSTALLATIONS ARE REGARDED AS PARTS OF THE COAST LINE FOR PURPOSES OF THE SUBMERGED LANDS ACT.

A. The Test Employed by the Special Master Was Designed by Its Authors to Apply Not to Coastal Structures, but to Artificial Islands.

The Special Master makes the observation at page 26 of his Report that "[s]ome artificial structures may . . . modify the coast line (within the meaning of the Submerged Lands Act), but others may not." Instead of looking to this Court's criteria for resolving the question of the piers, however, he looks elsewhere: "There must be a balancing of the competing considerations involved, and I now turn to that process. In balancing the considerations I shall be guided by the practical approach of commentators McDougal and Burke, *The Public Order of the Oceans* at 387-88 (1962). . . ." The approach of the two commentators used by the Special Master is then quoted:

> ". . . The principal policy issue in determining whether any effect for delimitation purposes ought to be attributed to *other formations and structures* is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased. . . ." (Emphasis added.)

As this Court has noted in a similar context, "It suffices to say that the Convention contains no such criteria." *United*

States v. Louisiana, supra, 394 U.S. at 41 fn. 48. That the Special Master chose not to employ the criteria established by this Court, and to use instead the test suggested by the two writers, is particularly surprising in light of the fact that earlier in his Report he had rejected a test urged by the Government, for precisely the reason that its use had not received the sanction of this Court. Report of the Special Master, p. 8.

Several comments on the McDougal and Burke criterion, however, are appropriate. First, the test was not suggested by the writers as applicable to structures "erected on the coast and jutting out to sea." It is presented in the portion of their book dealing with offshore installations *unconnected* with the coast. The authors give their frame of reference on page 387: "The main problems *regarding islands* concern whether the territorial sea may be measured from man-made islands, always above water, and whether a temporarily submerged area may be given a belt of territorial sea." The "other formations and structures" to which the authors refer in the passage used by the Special Master are explained on page 388 as "temporarily submerged areas, structures erected on the ocean floor, and floating objects." These are all offshore "formations and structures" and not "permanent structures erected *on* the coast and jutting out to sea" as described in paragraph 2 of the Commentary to Article 8 of the Convention. The authors do not discuss this latter type of structure until page 419. (The authors' view that some artificial structures *unconnected* with the coast are to be used for delimitation purposes, it should be noted, appears contrary to Article 10 of the Convention.)

McDougal and Burke, it should be noted, do not specify the nature of the "particular interest" of which they write. To adopt such a vague criterion after the many decisions in the submerged-lands cases would, it seems, invite further litigation on questions which had presumably been laid to rest. As noted above, the test was designed for offshore artificial installations which, it had seemed clear, were not to be used for delimitation purposes.

In any event, the Special Master's summary conclusion that the piers do not create " 'an interest in the surrounding waters that would not otherwise exist.' " cannot be maintained. Report of the Special Master, p. 28. They serve as ports, recreation facilities, and depending on need a variety of other purposes. In this sense they create a far greater interest in their surrounding waters than do beach erosion jetties and groins, for example, which have been ruled parts of the coast. These structures are the work of the Beach Erosion Board of the Corps of Engineers, which administers the national policy of "restoration and protection against erosion" of our shores. 33 U.S.C. § 426e. Such structures are designed to restore a former status or maintain the present status; piers on the other hand, extending the land into the sea for recreation, rail or other purposes, when built create an interest that did not exist before. Navigation patterns are changed to allow orderly vessel traffic to and from the piers and to provide safe clearance during periods of poor visibility. The piers are equipped with navigation lights, foghorns and radar reflectors, and these items are entered on coast

charts, the Coast Pilot, and other coastal literature.[54] Certainly the five piers that are used as ports for servicing offshore oil installations attain greater importance as the United States seeks energy self-sufficiency.[55] And the national policy of encouraging recreational use of our shorelines enhances the interest in waters adjacent to a pleasure pier that would not otherwise exist.[56]

Perhaps the essential characteristic of the piers, in regard to the McDougal and Burke test, is the fact that they support human activity. None of the other structures which have been decreed to constitute artificial extensions of the coast line do this. The groins which the Special Master alludes to on page 29 of his Report are simply lines of rubble placed perpendicular to a beach. (A number of the structures which were decreed by this Court in 1977 as artificial extensions of the coast line are depicted in Defendant's Exhibit GG. *United States v. California*, *supra*, 432 U.S. at 41-42.) In view of the human activity conducted on the piers alone, it would seem they create a far greater "interest in the surrounding waters" than do the other structures which have been treated as extensions of the coast line.

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[54]*See, e.g.*, United States Coast Pilot 7 (13th ed. 1977), Plaintiff's Exhibit 17, pp. 117, 121, 122, 124, 125, 136, 137, 141 and 155, Tr. Denver Hearings, p. 26.

[55]These are the Ellwood, Carpenteria, Rincon-Punta Gorda, Morro Strand and Port Orford piers. Tr. Denver Hearings, pp. 223-24, 299-300, 373-74.

[56]*See, e.g.*, Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

B. Domestic Law, Which Has Consistently Treated Piers as Parts of the Land, Could Have Been Consulted by the Special Master Instead. For the Drafters of the Submerged Lands Act Contemplated That Domestic and Not International Law Would Govern Questions of Interpretation.

We have seen that this Court has established precise criteria for determining what structures constitute artificial modifications of the coast line. Had there been a need to look for guidance elsewhere, it would have been far more appropriate to consult domestic jurisprudence before resorting to the suggestions of writers. For the drafters of the Submerged Lands Act clearly contemplated that questions of interpretation would be governed by domestic law.

Extensive hearings were conducted in the Senate Committee on Interior and Insular Affairs on Senate Joint Resolution 13, which became the Submerged Lands Act and which had been introduced by Senator Holland. 99 Cong. Rec., p. 257. Not surprisingly, much of the hearings concerned section 2 (c) of the Act (43 U.S.C. § 1301 (c)), the section in question in this proceeding:

> "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ."

During debate on section 2(c) the following exchange took place between Senator Long of Louisiana and Senator Cordon, the committee chairman:

> "Senator Long. In view of the fact that this amendment did not carry, I think the bill should either state

that we are bound by the Boggs formula [a State Department position on bays] or that we are not bound by it. Since it is, the chairman's view that we are not bound by such formula, I would like——

"Senator Cordon. *There is no question in the chairman's mind as that we are not bound by any opinion, expert or otherwise, that is not comprehended in the statutes of the United States or in the decisions of its courts.*" Hearings before the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, 1st Session, on S.J. Res. 13, etc. (hereinafter "1953 Senate Hearings") 1385 (1953). (Emphasis added.)

This Court has noted that the passage of the Submerged Lands Act transformed what had been perceived as a question of the limits of American territorial waters into a purely domestic controversy over the division of the continental shelf, which may extend many miles beyond the limits of territorial waters. *United States v. Louisiana,* 363 U.S. 1, 30-36 (1960). (To illustrate that the Submerged Lands Act so transformed the controversy, one may observe that the grants to Texas and Florida under the Act extended nine nautical miles into the Gulf of Mexico, six more than the limit of territorial waters.) The Court in *Louisiana* laid heavy emphasis upon the legislative history of the Act in reaching its conclusion, and especially upon the testimony before the Committee on Interior and Insular Affairs of Jack B. Tate, deputy legal advisor to the Department of State. *Id.* at 31.

Mr. Tate, accompanied by Assistant Legal Advisor Raymund T. Yingling, testified at length before the Senate

Committee concerning the effect of the Submerged Lands Act upon the conduct of foreign affairs by the federal government. 1953 Senate Hearings, 1051-1086. Mr. Tate prefaced his testimony with this statement:

> "I should like to make it clear at the outset that the Department [of State] is not charged with responsibility concerning the issue of Federal versus State ownership or control." 1953 Senate Hearings, p. 1051.

Under questioning, Mr. Tate said that pursuant to the 1945 Presidential Proclamation (Proclamation No. 2667, 59 Stat. 884), the United States claimed the right of exploration and control of the sea bed and subsoil of the Continental Shelf. 1953 Senate Hearings, p. 1955.[57] The significance of the 1945 Proclamation, as his testimony showed, was to make the division of the Continental Shelf strictly a matter between the federal government and the States. Congress could divide the claimed area in any manner it desired, strictly as a domestic matter.

Reiterating his theme that the State Department had no interest in federal-state problems, Mr. Tate commented:

> "As far as concerns the matter of the States versus the Federal Government, and the Federal Government against the States, I do not think that is a matter the State Department could pass on." 1953 Senate Hearings, p. 1956.

He then adopted the prior statement of the State Department in a letter to Senate Connally:

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[57]This assertion by the United States received international "ratification" in Article 2 of the Convention on the Continental Shelf. T.I.A.S. No. 5578, 15 U.S.T. (Pt. 1) 471.

> "'Generally speaking, so far as concerns the right of a Nation to control its own citizens at sea, the line between territorial waters and high seas is of no consequence, since the Nation has the same right of control both within *and beyond* that line. The division of that control between the Federal Government and the several States of the Union *is a question of domestic law . . . .*'" (Emphasis supplied.)

Congress then plainly contemplated that questions of interpretation would be governed by domestic law. Significantly, American admiralty Courts have uniformly held that piers, like other coastal installations, are extensions of the land. What one federal court observed in 1965 is equally true today: "[N]ot one case has been cited . . . holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters." *Johnson v. Traynor,* 243 F. Supp. 184, 187-88 (D. Md. 1965). The Court of Appeals of Maryland in 1907 quoted from the early American case of *The Haxby,* 94 Fed. 1016 (1899):

> "'The Century Dictionary defines a pier to be "a projecting quay, wharf or other landing place"; and, without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land, and for purposes of jurisdiction it should be so treated' . . . . The mere fact that these piers are built upon piles, instead of on solid ground, ought not to make any difference. They are permanent structures, and as effectively monopolize the use of the

land under them as if they were built in one of the other ways mentioned in *The Haxby*." *Western Maryland T.R. Co. v. Mayor, etc. of Baltimore*, 68 Atl. 6, 10 (Md. 1907).

See also Nacirema Co. v. Johnson, 396 U.S. 212, 214 (1969); *Hastings v. Mann*, 340 F. 2d 910, 911 (4th Cir. 1965), *cert. den.* 380 U.S. 963 (1965); *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346-347 (5th Cir. 1967); *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640, 644 (2d Cir. 1965); *East v. Oosting*, 245 F. Supp. 51, 54 (E. D. Va. 1965).

C. State Department Bulletins Published Between 1959 and 1969 Expressed the View That Piers Were to Be Regarded as Parts of the Coast.

While the Special Master consulted commentators McDougal and Burke, it is noteworthy that he ignored three Department of State documents published between 1959 and 1969 which deal with the question whether piers form parts of the coast line. In a Department of State Bulletin published in 1959, the author, then The Geographer of the Department, expressed the view that piers are to be regarded as forming parts of the coast.[58] In 1965 another Department of State document dealing with the law of the sea was published.[59] It includes a diagram showing how the territorial sea is measured. A pier, unconnected with any port or harbor, is used as part of the coast. (This article was cited by this Court in *United States v.*

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[58]Pearcy, Measurement of the U.S. Territorial Sea, XL United States Department of State Bulletin, No. 1044 at 963-68 (June 29, 1959). The relevant passage is quoted in 4 Whiteman, *supra* at 263.

[59]Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3, at 29 (1965).

Louisiana, supra, 394 U.S. at 51 n. 66.) The identical diagram was included in a revised edition of the same document published four years later.[60] While these writings contain disclaimers that they necessarily reflect policies of the Department of State, it is noteworthy that the views remained unchanged during this period.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court not follow the recommendations of the Special Master with respect to the sixteen piers on the California coast and instead enter in this cause a supplemental decree in the form proposed by Defendant State of California in its Proposed Fourth Supplemental Decree filed herein.[61]

November 14, 1979

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[60]Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3 at 31 (1969).

[61]Paragraph 3(i) of the proposed decree has been deleted by stipulation. See Report of the Special Master, p. 21 n. 17.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO CALIFORNIA'S EXCEPTION

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43 U.S.C. 1301(c) 6

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International Law Commission, *Yearbook* (1961) 21
I Shalowitz, *Shore and Sea Boundaries* (1962) 15
Webster's Third International Dictionary (1976 ed.) 18

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO CALIFORNIA'S EXCEPTION

STATEMENT

1. The case is here on cross-motions for a fourth supplemental decree.[1] At the suggestion of the par-

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[1] The Court entered its original opinion and decree in this case in 1947. *United States* v. *California*, 332 U.S. 19 (opinion); 332 U.S. 804 (decree). The first supplemental decree was entered in 1966. 381 U.S. 139 (opinion); 382 U.S. 448 (decree). The second supplemental decree was entered in 1977, 432 U.S. 40, and the third supplemental decree in 1978, 436 U.S. 32 (opinion); 439 U.S. 30 (decree).

ties, the Court appointed a Special Master, who took evidence,[2] held hearings and filed his final Report. The United States has not excepted to the Master's recommendations.[3] California, however, has filed an

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[2] In November, 1978, the Special Master, accompanied by counsel, inspected the areas in dispute along the California coast. Hearings were held in New York City on April 17-18, 1979, and in Denver, Colorado on May 7-9, 1979. See Special Master's report (hereinafter "Rep.") at 3.

[3] The United States has not excepted to the Special Master's recommendations that the closing lines proposed by California be drawn across the Port of San Pedro (see Rep. at 6-13) and San Diego Bay (see Rep. at 13-19). We acquiesce in those recommendations, limited as they are to their special facts. In doing so, however, we do not wish to be understood as agreeing with every statement that the Special Master made in reaching his ultimate ruling as to these closing lines.

Specifically, we disagree with the Special Master's conclusion that the "shortest distance test," upon which the United States relied in contending that the closing line at San Pedro from the western terminus of the Long Beach breakwater ought to be drawn to the Alamitos jetties (see Rep. at 32, 33), "has not been sanctioned in earlier Supreme Court decisions" (Rep. at 8). Although the Court has not referred to that test by name, that test has in fact been the basis upon which many closing lines sanctioned by this Court have been drawn. See *United States* v. *Louisiana*, 420 U.S. 529 (1975); 422 U.S. 13 (1975).

We likewise disagree with the Special Master's assumption that prior decisions of this Court, and the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) (Convention), recognize an "[i]mplicit * * * principle that closing lines * * * shall be straight" (Rep. at 9). Where, as at San Pedro, there are several mouths, the closing lines run between the natural entrance points which form the various mouths. See *Louisiana Boundary Case*, 394 U.S. 11, 54-60 (1966); Convention Art. 7(3). Nowhere does the Convention suggest that the closing lines

exception with a supporting brief, to which we now reply.

The single disputed question before the Court is whether open-pile piers constructed on shore and extending out to sea are extensions of the coast and thus proper base points for measuring the three-mile grant to coastal States under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* The Special Master has recommended that this Court enter a decree in favor of the United States, rejecting the claim that the California piers constitute extensions of the coast (Rep. 19-30). For the reasons stated in the Report,

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across the various mouths must run on the same bearing, nor has this Court ever enunciated such a rule. Indeed, as the Special Master recognized here (Rep. at 10), the closing line "will not be straight whichever way the line is drawn."

Finally, we believe the Special Master was mistaken in suggesting that the lines delineating inland waters for navigation purposes have any relevance to the determination of closing lines for purposes of the Convention. This Court squarely rejected such a contention in the *Louisiana Boundary Case, supra,* 394 U.S. at 17-35. Recognizing that his consideration of the navigation lines "may appear to be a departure" (Rep. at 10) from the holding in *Louisiana,* the Special Master set forth two reasons for considering the lines (Rep. at 10-12), neither of which we find persuasive. Because the Special Master explicitly reached his findings as to San Pedro "without regard to [the navigation] lines" (Rep. at 12), his use of those lines, even as "supplemental evidence" to support his findings (*ibid.*), was unnecessary. And only because he reached his findings for independent reasons to which we do not except do we acquiesce in those findings now. We believe that this Court's decision in *Louisiana, supra,* conclusively establishes that the navigation lines are irrelevant to the solution of questions arising under the Convention and the Submerged Lands Act.

and others, we urge the Court to adopt the Master's recommendations and to overrule California's exceptions.

2. The underlying facts are simple and undisputed. Along the coast of southern California are 15 piers (Rep. at 35-40, 42-50), and one artificial island that is connected to the mainland by a causeway very like a pier (Rep. at 41). Each of these piers is so situated that a three-mile arc swung from its tip would envelop a certain area of water that is not within three miles of any other part of the coast. The areas thus enveloped range from six acres in the case of the Venice pier (Rep. at 42) to 978 acres in the case of the Rincon Island-Punta Gorda Causeway complex (Rep. at 41).[4]

The piers themselves, as the Special Master found (Rep. at 20-21), range in length from 500 feet to 3,500 feet. They are set on permanent piles of concrete, steel or wood, with decks of asphalt, concrete or wood. Water flows freely underneath the piers, which have no visible effect on the surrounding shore line. Unlike jetties, groins or breakwaters, the piers were not designed to protect the shore or the surrounding waters. Most of the piers are open to the public, and may be used for strolling or rod fishing; one pier (Biltmore Hotel Pier, Rep. at 39) is owned

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[4] The diagrams appended to the Report (*id.* at 32-49) are those submitted by California in its petition for a decree (Cal. Pet. 11-49), except that El Segundo Pier (Cal. Pet. 33) has been demolished and is no longer an issue in this litigation (Rep. at 2 n.2). As we noted in our motion for entry of a decree (U.S. Mtn. 5 n.2), we have not verified the acreage figures. See Rep. at 1 n.1.

by a hotel across the street and was closed to all persons, apparently because of concern as to its stability, when the Special Master and counsel visited it in November 1978. Three piers (Ellwood, Morro Strand, and Carpinteria, Rep. at 36, 38, 40) are owned by oil companies, which use them to tie up vessels that supply offshore oil rigs.

The Rincon Island-Punta Gorda Causeway complex[5] (Rep. at 41) consists of an artificial island built by an oil company to service oil wells; it is connected to the mainland by a causeway some 2,700 feet long, over which motor vehicles travel to and from the island. The causeway is, in structure and design, indistinguishable from a conventional open-pile pier (Rep. at 20-21).

While there are any number of other piers along the California coast, the piers identified in this proceeding are, to the parties' knowledge, the only ones that can affect the State's three-mile offshore boundary; other piers, which are not at issue in this case, are situated so that an arc swung three miles from their tips would, at all points, be landward of a three-mile line defined by nearby points of the coast. The Court's decision in this case, however, will presumably apply to similar piers off the coast of other states that potentially extend the state's three-mile grant.[6]

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[5] Unless otherwise noted, references in this reply to "piers" include the Rincon Island-Punta Gorda Causeway complex.

[6] California's brief in support of its exception contains an extended discussion (Cal. Br. 6-12) of the history and use of these piers and other piers which are not involved in this

ARGUMENT

I. INTRODUCTION AND SUMMARY

A. The basic legal principles that govern the determination of federal-state boundaries at sea have been discussed at length by this Court in earlier stages of the present case and in other cases. See, *e.g.*, *United States* v. *California*, *supra*, 332 U.S. 19; *United States* v. *California*, *supra*, 381 U.S. 139; *Louisiana Boundary Case*, 394 U.S. 11 (1969). For present purposes, however, it is enough to remember that, after Congress passed the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which granted to California and other states ownership of lands within three miles of the state's "coast line," 43 U.S.C. 1311 (b)(1), 1301(b), 1301(c), this Court concluded that it would look to the provisions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) (Convention), for a more precise definition of the term "coastline." See *United States* v. *California*, *supra*, 381 U.S. at 165; *Louisiana Boundary Case*, *supra*, 394 U.S. at 33-34.

Thus, as the Special Master stated (Rep. at 3-6, 22-24), this case must be decided primarily in the light of the Convention and this Court's decisions

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litigation and which may no longer even exist. Nearly all of this historical information appears for the first time in California's brief and is, for that reason alone, entitled to little or no weight. In any event, its relevance is not obvious and indeed California makes little use of it in the argument.

construing it. Yet, as the Master also recognized (Rep. at 23-24), quoting the United States' expert witness, Elihu Lauterpacht, Q.C., "Nothing [on this issue] is inserted in the Convention on the Territorial Sea. * * * [I]n the present case we are dealing with a highly exceptional problem * * *."[7] That succint statement goes to the heart of the present inquiry. The testimony produced in this case[8] by experts for both parties is, we have no doubt, the most methodical and comprehensive analysis to be found in the law on the question whether piers such as these are extensions of the coast line. While both parties have found in this material support for their respective positions, we concede only the obvious by stating that the evidence is not compelling on either side.

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[7] A typographical error in the Report places this quotation at page 17 of Plaintiff's Exhibit 12. The correct citation is page 7.

[8] By agreement of the parties and the Special Master (see Rep. 3 n.3), the expert witness on international law for each party (Mr. Lauterpacht for the United States; Judge Philip Jessup for California) submitted, as direct testimony, lengthy written opinions that surely refer to every commentator, treatise and judicial opinion to have dealt even marginally with the question of artificial extensions of the coast. Both witnesses also analyzed thoroughly the *travaux preparatories* of the Convention, as well as prior attempts by international bodies to define the nature of the territorial sea.

Mr. Lauterpacht's direct testimony (Plaintiff's Exhibit 12) is 57 pages in length; Judge Jessup's (Defendant's Exhibit C) is 73 pages, plus addenda. These documents were exchanged in advance of cross-examination, which itself consumed two full days and produced a transcript of 280 pages.

B. Our submission is essentially in two parts: first, an affirmative case, demonstrating that the relevant provisions of the Convention effectively foreclose California's pier claim, and, second, a rebuttal of the several arguments advanced by the State to overcome those textual provisions.

1. We begin by invoking Article 3 of the Convention which establishes the usual rule: that the baseline for measuring the territorial sea is the low-water line along the coast. Plainly, an open pier, suspended over the water—unlike a solid artificial structure, such as a groin or jetty—does not satisfy this standard, lacking as it does the essential ingredient of a low-water line. The question, then, is whether piers qualify as part of the coast under any of the exceptional rules recognized by the Convention.

2. The only special provision of the Convention arguably relevant to the case of piers is Article 8, dealing with harbor works. But the solitary California piers, jutting straight out to sea, do not remotely qualify under this Article. A single pier like those in suit simply does not constitute, or help to create, a "harbor"—universally understood to be a partly enclosed and sheltered place of anchorage. Much less can an isolated pier be deemed part of a "harbor system." And, finally, a single pier does not fit the rule of Article 8 because the objective of that provision is to define as inland the waters enclosed by the arms of a harbor—and, obviously, the piers in suit produce no such bay-like area.

3. We turn, then, to the "Commentary" to Article 8, which speaks of certain "permanent structures * * * jutting out to sea" as "assimilated to harbor works." Rep. at 27. That comment, we suggest, ought not be read expansively to contradict the limiting language of the text. The actual examples given are structures that are both *solid*—"jetties and coast protective works"—and that perform a *function* akin to harbor works—deflecting the force of waves or seas and sheltering the area in their lee. If such works, even when detached from a port system, may qualify as part of the coast, there is good reason not to stretch the Commentary further. Its "legislative history" does not justify making too much of the words, and certainly does not warrant applying it to embrace open-work structures. Nor has this or any other Court invoked the Commentary to Article 8 to reach more than solid, coast-protective works.

4. Indeed, we find in this Court's judgment in the *Florida* case an indirect, but compelling, rejection of the proposition that open-work structures can be deemed extensions of the mainland. There the Special Master had found that one arm of "Florida Bay" was formed by the Florida Keys, which he treated as part of the mainland because of the causeway that made a continuous connection. But this Court disallowed the claim to "Florida Bay," on the objection that the Keys could not qualify as a headland. While that holding was premised on Article 7 of the Convention, rather than Article 8, this Court has elsewhere stated that the same standard applies.

Since the causeway there involved was similar in construction to the piers now before the Court—except only that the causeway was a more substantial structure—it must follow that the California piers also fail to qualify as part of the coast.

5. We next address the contention that the piers are part of the coast because they are indicated on official large-scale charts with the same thin black line used to denote the low-water line. This, in our view, is a frivolous point. The reason for showing the piers on the charts is simply to alert mariners of the obstruction. But the single projecting lines representing piers, groins, jetties or breakwaters are obviously not low-water lines and no one could reasonably so construe the charts.

6. The Special Master placed special reliance on the approach advocated by two commentators, McDougal and Burke, who suggest that a structure ought to be counted as part of the coast only if it "create[s] in the coastal state any particular interest in the surrounding waters that otherwise would not exist." Applying this standard, the Master concluded that the piers in suit do not have that effect. Although California itself urged the particular passage on the Master, it now complains that the criterion is too "vague." For our part, we believe the Master was justified in looking to McDougal and Burke for guidance and correctly applied the test they proffer.

7. Finally, we deal briefly with California's invocation of domestic law—specifically the Longshoremen's and Harbor Workers' Compensation Act—as

fixing the demarcation line between land and sea. The short answer is that this argument comes too late. The Court has long since determined to look to international law, and particularly the Convention on the Territorial Sea and the Contiguous Zone, for a definition of the coastline. To change the standard now would produce intolerably inconsistent results.

II. ARTICLE 3 OF THE CONVENTION EXCLUDES PIERS FROM THE "COAST LINE."

Article 3 of the Convention on the Territorial Sea and the Contiguous Zone provides the primary rule for determining the baseline from which the territorial sea (and, therefore, the grant to California) is measured:

> Except as otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast * * *.

At least in this Court, it is settled that the term "coast" as used here includes some artificial extensions of the natural shore. That was expressly held in this very case in 1965, 381 U.S. 139, 176-177, and incorporated in the decree implementing that decision. 382 U.S. 448, 449 (1966). The principle was applied in the *Louisiana Boundary Case*, *supra*, 394 U.S. at 40-41 n.48, in recognizing an artificially created spoil bank jutting out from shore as part of the coast,[9] and was presumably the premise of a

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[9] We discuss below at pages 25 to 26 the Court's treatment in the same case of beach erosion jetties at Grande Isle. See 394 U.S. at 49 n.64.

more recent decree in this case specifying the low-water line along some 22 jetties, groins and breakwaters as part of the California coastline. 432 U.S. 40, 41-42.[10]

Accordingly, one might expect California to place primary reliance on Article 3 in support of its claim that piers constitute extensions of the mainland. But California now relegates Article 3 to a distinctly secondary role (Cal. Br. 29-33) and relies chiefly on Article 8. The reason is obvious: piers on pilings lack the low-water line that is the essential ingredient of the "normal baseline" defined in Article 3. However open piers may otherwise resemble solid jetties, groins and breakwaters, the absence of a low-water line critically distinguishes piers and irrevocably excludes them from consideration under Article 3.[11]

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[10] So, also, in the *United States* v. *Louisiana*, 389 U.S. 155, 158 (1967), it was assumed that jetties off the coast would affect the modern coastline, and, in *Texas* v. *Louisiana*, 426 U.S. 465, 469 and n.3 (1976), the Court held that jetties must be taken into consideration.

[11] We recognize, of course, that the Special Master found this line of reasoning unpersuasive (Rep. at 24), and concluded that "[t]he continuity or discontinuity of the water line is an engineering characteristic which affects only whether or not the structure is a coast protective work" (*ibid.*). We respectfully disagree with this conclusion. Whatever might be the engineering characteristics of a structure with no continuous low-water line, one cannot disregard its legal characteristics. Because Article 3 establishes that, unless otherwise provided, the coast line is "the low-water line along the coast," a structure that has no low-water line cannot be "part of the coast" unless it fits within one of the exceptions to Article 3, a proposition we discuss in Section III.

In any event, we believe that the Special Master's conclusion implicitly recognizes this result. Although he was unim-

Of course, as Article 3 expressly recognizes, there are other, exceptional, ways of fixing the baseline. These include straight baselines (Art. 4), bay-closing lines (Art. 7) and lines drawn across the mouths of rivers (Art. 11). Plainly, none of these is relevant to the pier claims. And so, California invokes Article 8, which announces a special rule for harbors. It is to that Article that we now turn.

III. THE EXCEPTION IN ARTICLE 8 OF THE CONVENTION DOES NOT APPLY TO THESE PIERS.

Article 8 is the provision of the Convention upon which California places primary reliance.[12] It provides:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

It is immediately apparent that this provision does not easily fit our case. By its very language, Article 8 establishes a two-part test to determine what

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pressed with our argument as to Article 3, he nonetheless found that the piers did not come within the exception that Article 8 provides (Rep. at 25-29) and he concluded that "the California coast line follows the natural coast in the vicinity of these structures * * *" (Rep. at 29). If that is so (and we believe it is), it must be so by virtue of Article 3; in other words, because the exception does not apply, one reverts to the general rule.

[12] California professes to find support for its position in Article 3 of the Convention as well. Cal. Br. 29-33. We address that contention at pages 30-33, *infra*.

is a "part of the coast" under that Article. To qualify, a particular structure must be part of "the outermost permanent harbour works," and must, in addition, "form an integral part of the harbour system." As we shall see, the piers in suit fail on both counts. What is more, the whole object of Article 8 was to make clear that waters within a harbor are "inland waters" and that the territorial sea begins at the line connecting the outermost permanent structures of the harbor. That purpose has no application to solitary piers such as these.

A. The piers are not "harbor works."

In the *Louisiana Boundary Case, supra,* 394 U.S. at 36-40, this Court considered and rejected Louisiana's argument that dredged channels were "harbor works" within the meaning of Article 8. In doing so, the Court set certain standards for determining what "harbor works" are (*id.* at 36-37; emphasis added):

> Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term "harbor works" connoted 'structures' and 'installations' which were 'part of the land' *and which in some sense enclosed and sheltered the waters within.*

The Court went on to note that "this view comports with generally accepted definitions of the term 'harbour' and 'harbour' works,' " citing the leading definition of "harbour works" as "[s]tructures erected along the seacoast at inlets or rivers *for protective*

purposes, or for enclosing sea area adjacent to the coast *to provide anchorage and shelter*." 394 U.S. at 37 n.42, citing 1 Shalowitz, *Shore and Sea Boundaries* 292 (1962) (emphasis added).

The evidence is undisputed that none of the piers involved in this litigation provides shelter to surrounding waters or protection to the coast (Rep. at 20, 21, 28-29; D. Tr. 340).[13] In fact, California's expert on coastal engineering testified that, unlike jetties and groins, which are designed to break up wave action, piers are designed to have no effect on the movement of the sea (D. Tr. 354-355). Piers therefore neither "enclose" nor "shelter" nor "protect" and are thus beyond the definition of "harbor-works" that this Court adopted in the *Louisiana Boundary Case* for purposes of the Submerged Lands Act.

B. The piers are not "harbors."

At this point, it is perhaps appropriate to make what should be an obvious point—that no pier at issue here is a "harbor" in its own right. The *Louisiana Boundary Case* approved (394 U.S. at 37 n.42) Shalowitz' definition of a harbor appearing at 1 Shalowitz, *supra*, at 60 n.65. That footnote states:

> According to Coast Survey terminology for purposes of standardizing its use in surveying and charting, a harbor is "a natural or artificially improved body of water providing protection for

[13] "D. Tr." refers to the transcript of the hearing held before The Special Master in Denver on May 7-9, 1979. "N.Y. Tr." refers to the transcript of the hearings held before the Special Master in New York on April 17-18, 1979.

vessels, and generally anchorage and docking facilities," ADAMS, HYDROGRAPHIC MANUAL 54, SPECIAL PUBLICATION NO. 143, U.S. COAST AND GEODETIC SURVEY (1942). According to U.S. Navy usage, it is "any protected water area affording a place of safety for vessels." NAVIGATION DICTIONARY 98, H.O. PUBLICATION NO. 220 (1956). In legal terminology, it has been defined as "a haven, or a space of deep water so sheltered by the adjacent land as to afford a safe anchorage for ships." BLACK, LAW DICTIONARY (4th ed.) 847 (1951), citing *Rowe* v. *Smith*, 50 Am. Repts. 16 (1883) (Conn.); *The Aurania*, 29 Fed. 98, 103 (1886); and *People* v. *Kirsch*, 35 N.W. 157 (1887) (Mich.). "Port," according to Black, is a word of larger import than "harbor," since it implies the presence of wharves, or at least the facilities for receiving and discharging cargo. I Farnham, *The Law Of Waters And Water Rights* 507 (1904), gives the following definition for a harbor: "A harbor is a body of water so far surrounded by land as to provide safe anchorage for vessels, and provided with such natural or artificial advantages as to afford easy means for interchange of traffic between the shore and land. An indenture of the shore does not constitute a natural harbor, when, in its natural state, it merely furnishes vessels protection by the shelter of the upland."

Each of the various formulations has two elements in common: a harbor is a body of water, and it provides protection or shelter.[14] Obviously, a pier is not a body of water; and, as we have just shown, it does

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[14] California's expert witness agreed with this definition. D. Tr. 253, 338.

not provide shelter. As California's expert acknowledged, these piers "are not harbors." D. Tr. 367.

Nor is there merit to California's contention (Cal. Br. 28) that the piers are "works within a 'harbor' " because they are built in "area[s] of substantial protection from the elements * * *." The Special Master made no finding that any of the piers is in protected areas. The testimony on which California relies for the point (D. Tr. 304-306, 375-376; see Cal. Br. 12) proves too much; it suggests that all of Southern California is substantially protected from the elements. As the graphic depictions of the piers that California provided the Special Master (Rep. 35-50) demonstrate, the piers are along flat stretches of the coast, as indeed they would have to be in order to affect the state's grant under the Submerged Lands Act. In any event, even if one assumes that the piers are in areas of "substantial protection from the elements," that does not make them works within a "harbor." The accepted definition of a harbor (see pages 15-16, *supra*) excludes "[a]n indenture of the shore * * * when, in its natural state, it merely furnishes vessels protection by the shelter of the upland." I Farnham, *Law of Waters and Water Rights* 507 (1904), approved in 1 Shalowitz, *supra*, at 60 n.65. See *Louisiana Boundary Case*, *supra*, 394 U.S. at 37 n.42.

C. The piers are not part of a "harbor system."

If the Court should find, contrary to our argument, that the piers at issue here are "harbor works," it

must then address the second part of Article 8's test: do they "form an integral part of [a] harbour system"? The evidence shows that they do not.

The question can conceptually be split into two parts for each pier. First, does the pier form part of its own harbor system, that is, is it a harbor system in itself? Second, does it form an integral part of a harbor system that includes other components?

The first question must obviously be answered in the negative, for if a pier is not of itself a "harbor" (as we have just shown), then it cannot be of itself, a harbor "system." A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose; an aggregation or assemblage of objects joined in regular interaction or interdependence * * *." *Webster's Third International Dictionary* (1976 ed.) A single structure, such as a pier, thus cannot be a "system."

A pier can, as a conceptual matter, be *part of* a harbor system. But that is plainly not the case with the piers at issue here. It is undisputed (see Calif. Exh. I; Rep. at 20-21, 35-50) that these piers are isolated structures, naked against the beach and divorced from any other coastal feature, much less a harbor.

D. Piers do not enclose inland waters.

As Judge Jessup himself testified on behalf of California (see note 8, *supra*), "The concern [in drafting Article 8] was definitely with closing lines

in ports, rather than with the question of base points" (N.Y. Tr. 68). This is made clear when we refer to the initial proposal of 1930, when the League of Nations Codification Conference proposed the following formula (L. Dir. 20; J. Dir. 35; emphasis added):[15]

> In determining the breadth of the territorial sea, *in front of ports* the outermost permanent harbour works shall be regarded as forming part of the coast.

As Judge Jessup testified (N.Y. Tr. 62), the League of Nations proposals were the starting point for the deliberations of the International Law Commission (ILC), which drafted the treaty that became the Convention on the Territorial Sea and Contiguous Zone. Indeed, the first text considered by the Commission was that just quoted (L. Dir. 24; J. Dir. 38), and the reasons for changing it had nothing to do with our present concern (L. Dir. 25; J. Dir. 39-41).

The upshot is that Article 8, like Article 7 dealing with bays, was designed to define the boundary of inland waters in the case of a harbor: the waters enclosed by the artificial arms of the port and a line connecting them would be deemed "inland." Ob-

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[15] "L. Dir." and "J. Dir." refer to the prepared direct testimony of Mr. Lauterpacht (U.S. Exh. 12) and Judge Jessup (Calif. Exh. C), respectively, submitted to the Special Master at the hearings in New York on April 17, 1979.

viously, that concept does not fit the isolated pier structures involved here.

The Special Master was thus quite correct in stating (Rep. at 28), as to Article 8, "[w]hen all is said and done it seems clear that the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers erected on the open coast and not directly connected with any conventional harbor."

California argues, however, that the Article means much more than its language, or its history, suggests. And, in support, California invokes part of the "Commentary" appended to Article 8 by the International Law Commission. We turn to that Comment.

IV. THE PIERS CANNOT BE "ASSIMILATED" TO HARBOR WORKS UNDER THE COMMENTARY TO ARTICLE 8 OF THE CONVENTION

The International Law Commission's Commentary to the final draft of Article 8 (see L. Dir. 30; J. Dir. 50-51) included the following as Comment 2:

> Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dikes) are assimilated to harbour works.

The bulk of California's Article 8 case (Cal. Br. 18-29) rests on these words.

On its face, the Comment is ambiguous. It can be read to say, as California insists, that jetties and like structures, even when not an integral part of a harbor system, nevertheless qualify as "part of the

coast." But that would expressly contradict the text of Article 8—which requires of "true" harbor works that they form "an integral part of the harbour system." One would hardly expect such an inconsistent rule to be announced in a mere comment.[16] Yet, the Comment seems superfluous if it merely tells us that jetties, when part of a harbor system, should be viewed as "harbor works." That might be thought to go without saying. To resolve our dilemma, we turn to the "legislative history" and the application of Comment 2.

A. The "legislative history" of Comment 2.

1. It is agreed (see Cal. Br. 22-23; L. Dir. 24; J. Dir. 33-35) that Article 8 of the 1958 Convention did not break new ground, but merely codified, in almost the same words, a proposal adopted in

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[16] While Professor Briggs (Cal. Br. 21), a member of the International Law Commission, has stated that, in his opinion, the commentary of the ILC "interpret[s]" and "qualif[ies]" the text of the article to which it refers, he has also acknowledged that other members of the Commission, including its chairman, hold different views on the subject. H. Briggs, *The International Law Commission* 188-189 (1965). These other members have pointed out, in the course of official debate, the distinction between commentary and text: the commentary constitutes an "interpretation," but the text sets forth "the rules of law." International Law Commission, *Yearbook*, Thirteenth Session 59 (1961); see H. Briggs, *supra*, at 189. As one member stated, "[C]ommentaries [are] not on the same footing as the articles themselves." International Law Commision, *Yearbook*, *supra*, at 39. And, as the Chairman of the Commission noted, "because of the pressure of time, the commentaries could not receive the same thorough consideration as the text of the articles themselves." *Ibid.*

1930 by the League of Nations Conference. Then, as now, it was accepted that the outermost fixed harbor works in front of ports should be deemed part of the coast, primarily for the purpose of defining the harbor waters so enclosed as "inland" (see L. Dir. 18-20; J. Dir. 35). But neither in 1930 nor in the preliminary proceedings did anyone suggest that artificial structures jutting out to sea—whatever their construction—should be regarded as extensions of the mainland when not associated with a port or harbor.[17]

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[17] Nor is any such view reflected in the academic literature of the period. Judge Jessup, testifying for California, invoked three French writers whose published works presumably reflect the international understanding before the present Convention was drafted. First in time is Romee de Villeneuve (J. Dir. App. A6), who simply recites the accepted view (as of 1914) that "the waters of a port belong to the coastal state," without any reference to piers, much less to piers unconnected with a harbor. Next is Louis-Marie Renaud, whose treatise was published in 1933 (J. Dir. App. A1). From the testimony of Judge Jessup, one might suppose Renaud had written that open piers, although no part of a harbor system, extend the coast (J. Dir. 10). But the actual text invoked, and Judge Jessup's translation (J. Dir. App. A2-3), make clear the author has done no more than include piers as "an integral part of the ports" when they physically form part of a harbor system. Renaud does not remotely suggest that isolated piers extend the coastline.

Finally, much reliance is placed on the work of Professor Gidel, said to be "the greatest living authority on the law of the sea" (J. Dir. 10-11). Again, however, Judge Jessup initially gives us a misleading summary of the views expressed by Gidel in his 1932 treatise (*id.* at 11). The actual text (J. Dir. Ann. A8-10) nowhere mentions piers, and, more important, Gidel is at all times discussing harbor works "in front of ports," not lone structures unrelated to any harbor.

2. Article 8 and the portion of the Commentary that California relies upon were written in 1954. Yet there is nothing in the Commission discussions of that year that endorses treatment of artificial projections into the sea as extensions of the mainland, except when part of a harbor system. The late Professor Lauterpacht, not one expert witness for the Government, did raise a question about jetties that *were* part of a harbor system and, with apparent agreement from the other members, he *opposed* the inclusion of dykes (L. Dir. 24-25; J. Dir. 38-39). Thus, when Comment 2 emerged at the end of the 1954 session (L. Dir. 27; J. Dir. 43), it would naturally be read as simply clarifying that jetties could qualify as harbor works when associated with a port. And, no one having mentioned anything other than solid structures, there is equally no basis for construing the Comment as embracing piers.

In the ensuing session of the Law Commission, the text of Article 8 survived unchanged (L. Dir. 31; J. Dir. 46, 47, 49, 51-52), and the only alteration of the Commentary was a narrowing amendment (by deleting the reference to "dykes") and the addition of a caveat with respect to overlong jetties (L. Dir. 30; J. Dir. 50-51). This hardly suggests a radical change of view by the Commission. Yet, it is true that in 1955 and 1956, one finds some discussion of a very long "pier" or "jetty" in the Persian Gulf, apparently not part of a harbor, which at least some delegates believed covered by Article 8 (L. Dir. 27-29; J. Dir. 44-49). Understandably, California seizes on those references (Cal. Br. 24-27).

Without knowing more about the structure under discussion, it is dangerous to build on these passages. For our part, we think it questionable whether, without any change in the text of Article 8, or even any broadening of the Commentary, the Commission properly can be deemed to have announced a wholly new rule. The references invoked are too equivocal to support such a conclusion.

But, if we should now read Comment 2 as reaching some structures—such as solid jetties—even when not associated with a harbor system, it would be wholly unjustified to construe it as "assimilating" isolated open piers which serve no function akin to that of harbor works. The occasional appearance of the word "pier" in the English text of the *travaux preparatoires* is far too ambiguous. As Judge Jessup has noted, in British terminology (as opposed to American), the primary definition of "pier" is a solid stone structure—what Americans term a "jetty" (J. Dir. 4-7)—and it may well be that the construction discussed by Sir Gerald Fitzmaurice (Cal. Br. 25) was such a solid structure.[18]

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[18] In any event, California here relies on legislative deliberations that followed, rather than preceded, publication of the comment to which they refer. As this Court has noted when faced with similar arguments, "Legislative observations [following] passage of the Act are in no sense part of the legislative history." *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); see *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 6. See also *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).

B. Application of Comment 2.

In the *Louisiana Boundary Case*, *supra*, 394 U.S. at 49-50 n.64, the Court construed Comment 2 as embracing beach erosion jetties even if not "closely linked to ports," but the Court went on to stress that the structures in question performed a function of "harbor works" in that they indirectly sheltered the waters of a harbor. While we do not believe Comment 2 need be read so generously, that resolution of the question may be accepted here.

Indeed, this is perhaps the only way to give the Comment real meaning without, at the same time, doing violence to its status as a note to Article 8. The location of the Comment under Article 8 can be explained as indicating the Commission's view that the coastline is affected by artificial structures jutting out to sea (as opposed to artificial land-fill) only when they perform a function comparable to harbor works—such as protecting or sheltering the shore.

This reading is suggested not only by the fact that Comment 2 appears under the "harbor works" Article, but by the terms used. It is, indeed, difficult to "assimilate" to harbor works structures which bear no relation to harbor works. The examples of the Comment, moreover, point in the same direction. Jetties and "coast protective works" both shelter the coast and often provide a somewhat protected place of anchorage. As we have already noted (see pages 16-17, *supra*), open piers do not. To expand the Comment to include open piers would be to sever its ties to any Article of the Convention and to give it the

status of an additional, wholly independent, provision. That is, of course, not the proper role of a mere "comment,"[19] and we ought to resist that result unless the clearest evidence compels it. As we have seen, the proceedings leading to the formulation of Comment 2 require no such surprising conclusion.

Although California suggests (Cal. Br. 28) that the Master concluded that five of the piers "constitute port facilities," and that such a conclusion brings those piers within "the express terms of the text of Article 8" (*ibid.*), this contention misreads the Master's report. He found that three of the piers (Carpenteria, Ellwood and Morro Strand) are used by oil companies "for access to vessels which are used to supply offshore oil rigs" (Rep. at 21) and that Port Orford is a "port facility"—at least to the extent it has a coin-operated davit suitable for lowering small boats into the water (D. Tr. 334-355). However, the Master also quite properly concluded that the amount of shipping handled by these facilities does not justify deeming them "ports" (Rep. at 29).

This is a practical, common-sense conclusion well supported by the evidence. Merely because a port is a place for the transfer of passengers of cargo between ship and shore (see Rep. at 7 n.7) does not mean that any pier is transformed into a "port" when a roughneck hops aboard a service vessel or an angler uses a davit to launch his Boston Whaler beyond the surf. California's attempt to press the

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[19] See note 16, *supra* (Briggs).

Special Master's report to the limits of its literalnes must founder on the Master's own findings that any transfer of cargo or passengers at these four points is *de minimis* (Rep. at 29). Otherwise, California could thwart the purposes of the Convention by the relatively inexpensive expedient of installing a coin-operated davit on each pier that does not already have one. Plainly, the law should not turn on such trivia.[20]

In all, California's contention that these piers are included within Article 8 lacks support in the Article itself, its history and application, and even its commentary. Were that not enough to foreclose California's claim, a prior decision of this Court suffices.

V. TREATING THE PIERS AS PART OF THE COAST IS INCONSISTENT WITH THIS COURT'S DECREE IN *UNITED STATES* v. *FLORIDA*.

California's contention (Cal. Br. 20) that any "permanent structures erected on the coast and jutting out [to] sea" are part of the coast under Article 8 is inconsistent with *United States* v. *Florida*, 425 U.S. 791, 793 (1976) (see also *United States* v. *Florida*, 420 U.S. 531, 533 (1975)).

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[20] The Special Master did find that at Rincon Island there was a "large dock * * * with substantial hardware * * * for the berthing of vessels." Rep. at 20. And he did not include Rincon Island in the category of *de minimis* ports. Rep. at 29. However, he properly excluded Rincon Island for another reason—it is an artificial island and thus cannot serve as a basepoint for delimiting the territorial sea. See Rep. at 29; Convention, Article 10. And, he quite properly concluded, "the fact that the island is connected to the mainland by a pier" should not change that result. Rep. at 29.

In *Florida*, the Special Master concluded that there existed a "Florida Bay," defined by drawing a closing line from Knight Key to East Cape on the Florida mainland (see App. A, *infra*). This Court rejected that conclusion. 425 U.S. at 793. Although it did not spell out its reasons for doing so, the only apparent justification for the result is that the Court did not consider the Florida Keys to be a part of the mainland coast; if the keys were a part of the mainland coast, "Florida Bay" would be a striking—indeed, almost perfect—example of a bay (see App. A, *infra*) within the meaning of Article 7 of the Convention.[21] Since the Florida Keys are connected by a causeway (see, App. A, *infra* and U.S. Ex. 14 in this case), the result of the Florida case is that an island and causeway system, although connected to the mainland, is not "part of the coast" of the mainland.

In recommending that "Florida Bay" be adjudged inland waters, the Special Master stated (Report in No. 52, Orig. at 39):

> This area [i.e., eastward of the closing line drawn from Knight Key to East Cape] comprises for the most part very shallow water which is not readily navigable and nearly all of

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[21] Article 7 defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." A bay must also meet the semicircle test (Article 7(2)) and the 24-mile test (Article 7(4)). The Special Master drew "Florida Bay" to meet both these criteria. The chart appended to this brief is taken from the Master's Report in the *Florida* case.

> which is dotted with small islands and low-tide elevations. I find that this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State * * *.

He concluded (*id.* at 57):

> The waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key comprise Florida Bay and constitute inland waters of the State of Florida and the closing lines between the several upper Florida Keys and the said line between the East Cape of Cape Sable and Knight Key mark the seaward limit of those inland waters.

The United States excepted to this conclusion, arguing that Florida Bay could not be a bay within the meaning of Article 7 "unless the islands are 'so closely aligned with the mainland as to be deemed a part of it.' [*Louisiana Boundary Case, supra,*] 394 U.S. at 67 n.88." *United States* v. *Florida,* No. 52, Orig., Exceptions of the United States to the Report of the Special Master at 10. The United States then urged that Florida Bay did not meet the test of the *Louisiana Boundary Case* because the upper Florida Keys cannot realistically be considered part of the mainland; specifically, the channels and water gaps west of Teatable Key precluded any finding that the keys further west are so closely aligned with the mainland as to be deemed a part of it.

Thus, the conclusion of the Court that "[t]here are no inland waters within Florida Bay" (425 U.S. at 793) necessarily means that the keys east of Knight Key (App. A, *infra*) do not form part of the coast of Florida, even though they are linked to each other and the mainland by the causeway.

That ruling is dispositive here. The causeways connecting the Florida Keys and California's piers are of very similar construction, albeit the former are more substantial, supporting constant vehicular traffic. Furthermore, if the piers here are "part of the coast" under Article 8, they must be "part of the coast" under Article 7 as well. See, *e.g.*, *Louisiana Boundary Case*, *supra*, 394 U.S. at 38 n.44 ("[I]f dredged channels were really 'part of the coast' within Article 8, their seawardmost extensions could also serve as headlands from which lines closing indentations could be drawn.") But since *Florida* establishes that an island-causeway system (and, *a fortiori*, a causeway or pier itself) cannot be "part of the coast" under Article 7, any theory that maintains that it is a part of the coast under Article 8 is invalid.

VI. THE PIERS ARE NOT "PART OF THE LOW-WATER LINE" ON THE GOVERNMENT'S OFFICIAL CHARTS

California's next contention (Cal. Br. 29-33) relies on Article 3 of the Convention insofar as it specifies that the "normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast *as marked on large-scale charts officially recog-*

nized by the coastal State" (emphasis added). The claim is that the United States has marked the piers as part of the low-water line on its official charts and that, therefore, under that Article, the piers are already part of the low-water line. This argument is wholly without merit.

If California's factual premise were true, this latest chapter of the litigation would have been unnecessary. California's purpose in seeking entry of a decree is in fact to compel the United States to recognize the piers as part of the coast line (see Cal. Pet. 3-4). Its Article 3 argument appears to be that the United States has already done so. We have not.

What the United States has done, as a matter of cartography, is to use a thin black line on its charts to denote the place where land and water meet. See Def. Ex. U-1 (Deposition of Dr. Hodgson); Def. Ex. AA (chart of the California coast). This line is placed, as nearly as the limitations of mapmaking permit, along the low-water line, and so may be said to represent the low-water line on the coast. The United States also uses, as a matter of cartography, a thin black line to represent jetties, groins, breakwaters, piers and similar structures that protrude into the sea (D. Tr. 152-153). California seeks to exploit this coincidence. But there is no basis for confusing the two lines.

Any mapmaker is obviously limited to some extent in his use of symbols, and a thin black line is a reasonable practical representation of a thin, straight

structure such as a pier or jetty. One purpose of the charts, after all, is to aid the mariner, and the cartographer should not be required to resort to circles or squares or some other inappropriate symbol to represent a pier merely because he has used a thin black line to represent the low-water mark. The chart reader is not misled: the single straight line jutting out to sea does not *look* like a low-water line, normally curved and obviously defining the boundary of land.

The evidence on which California relies provides no support for its form-over-fact proposition. It claims (Cal. Br. 30) that the late Dr. Hodgson, the Geographer of the Department of State and the United States' expert witness in this area, testified in his deposition that "structures such as groins are treated as parts of the coast by virtue of Article 3, that is, since [sic] they are represented by the same solid black line that represents other segments of the low-water line along the coast" (Cal. Br. 30-31; footnote omitted). Dr. Hodgson said no such thing. He testified that breakwaters and groins are part of the coast line; he said nothing about the fact that they, like piers, are depicted by black lines. Def. Ex. U-1 at 131; see Cal. Br. 31 n.49. Similarly, Mr. Lauterpacht, the United States' expert witness on international law, did not testify, as California contends, that "breakwaters also are considered parts of the coast by virtue of Article 3, because they are marked as parts of the low-water line on the official Government charts" (Cal. Br. 31; footnote omitted).

Mr. Lauterpacht testified that breakwaters are part of the coast; like Dr. Hodgson, he did not even mention black lines or any other cartographic symbol. His testimony was that a breakwater is part of the coast "by virtue of the direction of its alignment, by virtue of its proximity to the coast, by virtue of its function as being there to protect the coast, by virtue of its being solid to the ground, all those things accumulate together in effect to make it a part of the coast" wtihin the meaning of Article 3. N.Y. Tr. 186-187; see Cal. Br. 31 n.50.

Thus, the fact that piers are represented on the charts by black lines similar to those representing jetties, breakwaters and other parts of the coast (Cal. Br. 31-32) is immaterial to resolving the question whether piers ought to be considered part of the coast or not.[22]

VII. THE ACADEMIC COMMENTARY INVOKED BY THE SPECIAL MASTER SUPPORTS HIS CONCLUSION

After concluding that "the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers * * *," and finding that this Court's prior decisions did not answer the question (Rep. at 28), the Special

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[22] We agree with California (Cal. Br. 32-33 & n.53) that it is irrelevant that the three-mile line offshore, as depicted on some charts, appears to be drawn from the tips of some piers. As Dr. Hodgson testified, these minute discrepancies are attributable to imprecision in drafting and slight misalignment in the color plates used to produce the charts. D. Tr. 381-386.

Master turned to the so-called "reasonableness test" articulated by the commentators McDougal and Burke in their treatise THE PUBLIC ORDER OF THE OCEANS, published in 1962 (Rep. at 26-27, 28). According to those writers (Rep. at 26-27):

> When the construction of an area of land serves consequential coastal purposes, it would seem to be in the common interest to permit the object to be used for delimitation purposes * * *. The principal policy issue in determining whether any effect for delimitation purposes ought to be attributed to other formations and structures is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased * * *.

Applying this "practical approach" (Rep. at 26) to the facts before him, the Special Master concluded that the piers did not create "an 'interest in the surrounding waters that would not otherwise exist.'" Rep. at 28.

California now advances the curious argument that this test is inconsistent with the Convention (Cal. Br. 34), is inapplicable in any event to structures such as piers (*id.* at 35), and is a "vague criterion" that will invite further litigation (*id.* at 36). The contention is curious because Judge Jessup, California's expert witness, relied on the McDougal-Burke treatise—in fact, on precisely the language quoted by the Special Master—to support California's position that the piers are indeed part of the coast (J.

Dir. 63-64). Moreover, in its brief to the Special Master, California urged the adoption of the McDougal-Burke test, quoting it at length, and told the Special Master that "[c]ertainly the California piers meet the suggested criterion." Cal. Br. to Special Master 15-16.

Now that the Special Master has adopted the standard California urged upon him, but has reached under it a result adverse to California, the State attacks the standard itself as inappropriate, unapproved, and vague. California, we suggest, cannot have it both ways. Its prior advocacy of that standard justifiably produces some skepticism about its present objections.

In any event, there is no merit to California's contention that consideration of the factors that McDougal and Burke describe is a departure from the Convention or the prior decisions of this Court. The Master quite plainly did not use the McDougal-Burke test to displace prior law on the subject. He carefully considered every appropriate aspect of the Convention and all applicable prior decisions of this Court before coming to the conclusion that they did not provide a clear answer to the pier question (Rep. at 5-6, 21-28). By looking to learned commentators to ascertain what the law is or should be in this area, the Special Master did nothing more than what this Court has done in this and other cases. See, *e.g.*, *United States* v. *California*, *supra*, 332 U.S. at 31 & n.10, 32 & nn.11-12, 33 & n.17; *Louisiana Boundary Case*, *supra*, 394 U.S. at 23 n.26, 24 n.29, 29 n.35,

47 n.63, 51 n.67, 57 n.78, 62 n.82, 65 & n.85, 68 n.90, 71 n.95, 76 n.103; *United States* v. *Alaska*, 422 U.S. 184, 200 (1975). Indeed, this Court has used the McDougal-Burke treatise to aid it in deciding questions concerning delimitation of the territorial sea. *Louisiana Boundary Case*, *supra*, 394 U.S. at 23 n.26, 47 n.63, 68 n.90, 69 n.92, 76 n.103.[23]

Thus, contrary to California's belated assertions, the Special Master was hardly departing from the principles laid out by this Court when he referred to what Mr. Lauterpacht called "the most substantial exposition of the law of the sea to have appeared since the Geneva Conference of 1958" (L. Dir. 35).

Moreover, the Special Master was correct in concluding, under the reasonableness test, that the piers at issue here do not create an interest in the surrounding waters that would not otherwise exist (Rep. at 28-29). Unlike breakwaters, harbors, jetties and similar structures designed to facilitate use of the surrounding waters or to protect the shoreline in the vicinity, the piers at issue here are designed precisely to have *no* effect on the surrounding waters or shoreline, as California's own expert witness on engineering testified (D. Tr. 340; see page 15, *supra*). Rather, the piers are primarily recreational in nature, allowing pedestrians to stroll from the beach and fishermen to cast their lines.

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[23] Other courts have also found the treatise helpful. See, *e.g.*, *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 387 n.36 (D.C. Cir. 1979); *United States* v. *Postal*, 589 F.2d 862, 871, 878-879 (5th Cir.), cert. denied, No. 78-1714 (Oct. 1, 1979).

The fact that the piers "support human activity" (Cal. Br. 37) does not mean that they create an interest in the surrounding waters sufficient to accord the piers status as part of the coastline.[24] And as to the three piers that are used to tie up vessels used in oil operations, the Special Master found on the basis of all the evidence (including his personal visit to the piers, see Rep. at 3), that the volume of shipping was not so significant as to justify different treatment for them. This conclusion is supported by

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[24] This argument of "human activity" is apparently all that remains of the test that California once advanced as determinative of the question here.

Judge Jessup's testimony was that the "distinguishing characteristic" (N.Y. Tr. 128) between coastal structures that are basepoints and those that are not is whether the structure has "a definite passageway which is utilized so that there is a really human traffic, as it were, between the shore and the end of [the] artificial structures[]." *Ibid.* Thus, for example, he would not draw a basepoint from the seawardmost extension of airport runway approach lights extending into the sea (id. at 121-123), but if one assumed that there were a roadway leading from the shore to the outermost light, the resulting structure would "come within the definition of the assimilated structures" (id. at 124). Similarly, a sewage outfall pipe would not form part of the coast unless there were a means of human traffic on it; with such a means, it becomes, in Judge Jessup's view, indistinguishable from a pier, and its end would be a base point (*id.* at 127-128).

Consistent with this reasoning, Judge Jessup would use an open-work causeway to delimit the territorial sea. In his view, a causeway to an island is essentially "a pier going out to meet it" (N.Y. Tr. 99). He thus agreed that if the island were removed, the territorial sea would be measured from the tip of the causeway (*id.* at 111). Judge Jessup applied this principle to conclude that a causeway that traversed high seas between two territorial seas would generate a terri-

the evidence, and California has suggested no basis for ignoring the Master's recommendation in this respect.

VIII. THE CONTROLLING PRINCIPLES ARE THOSE ESTABLISHED BY THE INTERNATIONAL LAW OF THE SEA, ESPECIALLY THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, NOT DOMESTIC LAW RULES ADOPTED FOR WHOLLY DIFFERENT PURPOSES

California contends (Cal. Br. 38-42) that it was the intent of Congress that domestic law govern questions of construction of the Submerged Lands Act. It then cites a number of decisions in which the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, rather than admiralty law, was applied to accidents occurring on piers. From this California concludes that piers are part of the land rather than of the sea.

The argument comes too late. A decade and a half ago, in this very case, the Court reached a different conclusion. It was found that, in enacting the Submerged Lands Act, Congress had left the definition of the coastline to the courts. And the Court determined that the provisions of the Convention, not

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torial sea of its own, at least on the assumption that the causeway was so low to the water that ships could not pass underneath (Jessup Cross 106-107). The Florida case implicitly rejects such a theory. See pages 27 to 30, *supra*.

Nowhere does the Convention or its history provide a basis for making coastline determinations turn on a structure's use as a human passageway, and California appears now to have abandoned Judge Jessup's rationale.

domestic law, should govern in applying the Act. *United States* v. *California*, *supra*, 381 U.S. at 150-154. That ruling was reaffirmed when Louisiana argued that inland waters should be delimited for purposes of the Submerged Lands Act as they had been under an 1895 statute that referred to the "harbors, rivers and inland water of the United States." This Court found no indication that Congress intended to tie the meaning of inland waters in the later Act to that in the former. *Louisiana Boundary Case*, *supra*, 394 U.S. at 19; see note 3, *supra*.

Accordingly it is irrelevant that admiralty law has not been applied to accidents that occur on piers. As we have noted (see pages 27 to 30, *supra*), substantial bridges joining the Florida Keys are not part of the coast for purposes of the Submerged Lands Act. Yet no one would suggest that admiralty law should govern traffic accidents on those bridges. We are here concerned with construing the Submerged Lands Act and the Convention, not the Longshoremen's and Harbor Workers' Compensation Act.

In addition, Congress has specifically provided that the Longshoremen's and Harbor Workers' Compensation Act, rather than admiralty law, is to be applied to activities on oil rigs on the outer continental shelf. Outer Continental Shelf Lands Act, 43 U.S.C. 1331, 1333(c).[25] Following California's logic, this fact

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[25] The Outer Continental Shelf Lands Act provides for Federal administration of the seabed resources seaward of the area granted to the States under the Submerged Lands Act. The two Acts were considered together by Congress and enacted within 80 days of each other.

would make the rigs part of the "coast" and base-points for measuring Submerged Lands Act grants. Yet Article 10 of the Convention provides that artificial islands are not part of the land. The fact that activities on them are not governed by admiralty law is of no international consequence. As Mr. Lauterpacht testified, a domestic claim is not necessarily valid under international law, and where there is a conflict, the restrictions of domestic law must yield. N.Y. Tr. 248-249. Judge Jessup agreed. N.Y. Tr. 264.

CONCLUSION

The exception of the State of California to the Special Master's Report should be overruled and the Court should enter a decree as proposed by the United States in paragraph 3 of its Proposed Fourth Supplemental Decree (regarding the piers).

The United States has no objection to entry of a decree as proposed by the State of California in paragraphs 1 and 2 of California's Proposed Fourth Supplemental Decree (regarding the closing lines at San Diego and San Pedro). See note 3, *supra*.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

REPLY BRIEF OF THE STATE OF CALIFORNIA

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SUBJECT INDEX

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I

Article 8 of the Convention establishes that the sixteen piers "shall be regarded as forming part of the coast" 6

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International Law Commission (General Assembly Resolution 174 (11) Nov. 21, 1947) 12

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

REPLY BRIEF OF THE STATE OF CALIFORNIA

INTRODUCTION

The United States, in its Brief in Opposition to California's Exception, depreciates the importance of the historical context of this controversy. U.S. Brief, p. 5, fn. 6. That context, especially with respect to the "particular interest" test advocated by the Special Master and the Government, cannot be ignored. It demonstrates that piers were historically the ports of southern California, and that, as circumstances require, recreational piers can be converted to commercial ports in a matter of days. (The Spe-

cial Master found that five of the sixteen piers which are the subject of the present controversy meet the definition of a port. Report, pp. 7 n. 7, 20-21.) Moreover that history underscores the fact that the sixteen piers meet the International Law Commission's criterion of "[p]ermanent structures erected on the coast and jutting out to sea. . . ." Lastly, the history of these piers demonstrates that, perhaps to a greater degree than other coastal installations which have been decreed to be parts of the coast, they create a "particular interest in the surrounding waters that would otherwise not exist . . . ." For these reasons, and the others which we have briefed, the sixteen piers constitute artificial extensions of California's coast line within the meaning of this Court's prior decrees in this case. *United States v. California*, 382 U.S. 448, 449 (1966); *United States v. California*, 432 U.S. 40, 41-42 (1977).

The young State of California, as we have shown, was blessed with a coast line along the Pacific Ocean of more than one thousand miles. In contrast with States on the Atlantic seaboard, however, California's coast line possessed few fully enclosed natural harbors.[1] In Southern California there was but one, San Diego Bay, at the extreme southern end of the State. As commerce developed, consequently, piers were built along the coast to serve as ports. In southern California, where fifteen of the sixteen piers in the present controversy are located, natural features such as offshore islands and submarine canyons provided a protection from the sea such that vessels could lay alongside piers 330 days a year. Piers such as the Santa

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[1]House of Representatives Report No. 2515, 82d Congress, 2d Session p. 19 (1952).

Monica also became popular for their restaurants, fishing and views.

Only later, well after the turn of the century, did artificial harbors appear on the California coast, formed by the building of rock breakwaters. The extensive Los Angeles-Long Beach Harbor in San Pedro Bay is the most notable example. While heavier shipping concentrated there, piers continued to serve as subsidiary ports between the principal facilities at San Diego, Los Angeles, and San Francisco, and other piers were used for recreation. *See* Exception of the State of California and Supporting Brief ("California Brief"), pp. 6-12.

Still later other kinds of coastal structures appeared on the California coast, structures called "jetties" and "groins." Built of closely driven pilings, or more frequently of piled boulders, these structures have diverse functions. Some have been built for purposes related to navigation or coast protection. Others exist for a variety of purposes unrelated to navigation or coast protection, such as providing power plants with an intake for cooling water.[2]

Of these breakwaters, jetties and groins, this Court has decreed all which affect the three-mile submerged-lands grant to California to constitute artificial extensions of California's coast. *United States v. California*, 432 U.S. 40 (1977).[3] The United States argues, however, that the sixteen piers ought not to be similarly treated. Among the principal arguments the Government raises in its Brief are these: (1) Those piers which the Special Master found

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[2]Tr. Denver Hearings, pp. 220-221, 233-234.

[3]Photographs of these structures are contained in the green binder, California Exh. GG.

to be ports are too modest to be treated in law as ports. (2) The fact that the piers are built of timber, concrete or steel pilings, rather than of rock, disentitles the piers to treatment as parts of the coast. (3) The use of piers as ports, or for fishing, dining and strolling, does not create an "interest in the surrounding waters that would otherwise not exist," such as is conceded to exist in the waters surrounding, for example, a rubble groin. (4) The piers should not be treated as parts of California's coast because they are akin to the causeway connecting the Florida Keys, which had it been treated as part of the coast would have created a 100-mile artificial extension of Florida into the sea. (None of the piers in controversy exceeds 3,500 feet in length.) (5) This Court may not consult the sound judgment found in nearly one hundred years of domestic admiralty jurisprudence, which holds firmly that piers are to be treated as extensions of the land and not as parts of the sea.

In reply to the matters raised by the Government, we wish to emphasize these points:

(1) The legislative history including the official Commentary to the Convention on the Territorial Sea and the Contiguous Zone shows that such structures as the sixteen California piers are parts of the coast for the purpose of measuring the territorial sea. T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 ("the Convention"). Article 8 of that Convention establishes two propositions. The first is that port facilities "shall be regarded as forming part of the coast." Historically, piers were the ports of Southern California, and the Special Master found that five of the piers in controversy meet the definition of a port. Report, pp. 7

n. 7, 20-21. The second proposition, as this Court has recognized, is that the Article "expressly covers artificial structures which are not closely linked to ports," so long as the structures are permanent, connected with the coast, and not of excessive length. *United States v. Louisiana*, 394 U.S. 11, 50 n. 64 (1969). Each of the piers meets the Convention's criteria.

(2) This case concerns the status of sixteen existing piers on California's coast. As the Special Master observed (Report, p. 26), neither California nor any other State can extend its submerged-lands ownership against the will of the Government by building new piers. The Army Corps of Engineers could refuse to allow construction of a pier, or as it has done in the past, condition its permission upon a waiver by the State of any claim of additional submerged land which would be generated by treating the new pier as part of the coast.[4]

(3) Employing the test adopted by the Special Master and the United States, the California piers unquestionably create a "particular interest in the surrounding waters that would otherwise not exist." In this respect perhaps the most telling episode in the historical context of this controversy occurred during World War II, when our armed forces occupied all of the piers on the California coast. Some were used as ports for the vessels patrolling the Pacific Coast; others were held under guard to prevent their use by enemy ships.[5]

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[4]California Exh. S; California Exh. P, document no. 50.

[5]Tr. Denver Hearings, pp. 303-304.

Article 8 of the Convention on the Territorial Sea and Contiguous Zone specifically addresses the status of coastal structures extending into the sea. For that reason we treat first the Government's arguments in respect of Article 8. We next address its remarks respecting Article 3 of the Convention, and then its other points.

ARGUMENT

I

ARTICLE 8 OF THE CONVENTION ESTABLISHES THAT THE SIXTEEN PIERS "SHALL BE REGARDED AS FORMING PART OF THE COAST."

A. The Text of Article 8 Specifically Treats Port Facilities as Parts of the Coast.

In 1966 this Court decreed, "The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system *within the meaning of* Article 8 of the Convention on the Territorial Sea and the Contiguous Zone . . . ." *United States v. California*, 382 U.S. 448, 449. (Emphasis added.) The English text of Article 8 provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

As we have stressed (California Brief, pp. 27-28) and reiterate below, the French text of the Convention is equally authoritative with the English. When the two are read together it is seen that Article 8 focuses primarily on ports. Nevertheless the United States in its Brief em-

phasizes the concept "harbor" virtually to the exclusion of considering whether the piers or any of them constitute ports. U.S. Brief, pp. 13-18. It dissects the English version of the article and argues that the piers are not "harbor works," that they are not "harbors," and that they are not part of a "harbor system." *Id.*

Certainly they are not harbors; a harbor is a body of water, not a structure. Nor are the piers "harbor works" according to the definitions produced by the United States, all of which define a breakwater; yet it is certain that various structures other than breakwaters constitute harbor works within the meaning of Article 8. See *United States v. California*, 432 U.S. 40, 41-42 (1977). The fifteen piers which are located in southern California are, however, parts of a harbor system in the fact that they lie within the natural protection afforded by that coast.[6] But for thirty or so days a year, when storms arrive from the southeast, these piers have no need of sheltering features other than what nature has provided.[7] Even were these piers not located within this natural harbor system, however, it is clear they are "harbor works" within the meaning of Article 8.

A port, as the Special Master found and as the parties agree, "is any place where passengers or cargo may be transferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe

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[6]The sixteenth pier, Sharpe Beach, is located just south of San Francisco. It does not enjoy the natural protection of the southern California piers.

[7]*See* Exception of the State of California and Supporting Brief ("California Brief"), p. 12.

anchorage and sheltering for boats from weather conditions prevailing on the open sea." Report of the Special Master, p. 7 n. 7. Implicit in the Government's argument respecting the text of Article 8 is the suggestion that the term "harbor works" applies strictly to works associated with a harbor, and not to port facilities unconnected with a harbor. Yet plainly the International Law Commission did not make the distinction between a port and a harbor which was noted by the Special Master. Report, p. 7 n. 7. The Commission titled Article 8 (in both French and English) "Ports." Moreover, the French text of the article, which is equally authoritative with the English and which must be read together with the English to fully ascertain the meaning of the article, speaks not of "harbor works" but of the "permanent installations" of a "port system." Too, the first paragraph of the ILC's official Commentary to Article 8 specifies the rule for enclosing the inland waters of a "port" (*see* note 11, *infra*). This point is expounded in more detail in our opening Brief at pages 27-28.

The Special Master found that five of the piers meet the definition of a port. These are the Rincon-Punta Gorda, Carpinteria, Ellwood, Morro Strand and Port Orford piers. Report of the Special Master, pp. 7 n. 7, 20-21. These piers then, being "permanent installations" of a "port system," are "harbor works" within the meaning of Article 8.

The United States then asserts, however, that the Special Master found that the transfer of cargo and passengers at these piers is *"de minimis,"* and that the Master "concluded that the amount of shipping handled by these facilities does not justify deeming them 'ports.'" U.S. Brief,

pp. 26-27. First, the Special Master did not conclude that the amount of shipping handled by these piers was not sufficient to deem them "ports"; he plainly considered them ports. Report, pp. 7 n. 7, 20-21. His recommendation was that the amount of shipping handled was insufficient to consider them as structures *assimilated* to harbor works pursuant to the official Commentary to Article 8. Report, p. 29.[8] As to the suggestion that a port must handle a certain volume of shipping before it is deemed in law a port, "It suffices to say that the Convention contains no such criteri[on]." *United States v. Louisiana,* 394 U.S. 11, 41 fn. 48 (1969).

In any event, there is no evidentiary basis for the Special Master's statement. The issue in this respect before the Master was whether the piers or any of them are or are not ports, not whether they are extensive ports or modest ports. No evidence of the volume of shipping handled by these five piers was offered by either party. Since the Government has seized on this remark of the Special Master, however, it may be worth noting that where figures are readily available, the volume of shipping can be surprisingly large.[9]

The United States agrees that the Port Orford Pier is a port facility "at least to the extent it has a coin-operated

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[8]The Government's remarks with respect to that Commentary are treated in sub-part I B, below.

[9]The Corps of Engineers, for example, reports that 4.4 million tons of cargo was transferred at Morro Strand Pier (listed under Estero Bay) in 1973. By contrast, the fully enclosed waters of the adjacent Morro Bay harbor (see *United States v. California,* 432 U.S. 40, 41, para. 2a) handled but 2,799 tons. Waterborne Commerce Statistics, U.S. Army Corps of Engineers (1973), p. 9. See Tr. Denver Hearings, p. 205, lines 12-15.

davit suitable for lowering small boats into the water." U.S. Brief, p. 26. This facility, it should be noted, is also equipped with a water-level landing (see California Exh. I) and three massive dolphins on its lee side for berthing larger vessels, today primarily oil-company ships. Tr. Denver Hearings, p. 300. These features were observed by counsel and the Special Master during an onsite inspection in November, 1978.[10]

B. The Commentary of the ILC, as this Court Has Recognized, Shows that Article 8 "Expressly Covers Artificial Structures Which Are Not Closely Linked to Ports," if They Are Permanent and Connected with the Coast.

The second paragraph of the ILC's official Commentary to Article 8 reads:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works."[11]

Citing to this paragraph of the Commentary, this Court has held that Article 8 "expressly covers artificial structures which are not closely linked to ports." *United States v.*

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[10]A vessel is seen leaving the Carpinteria Pier in the aerial photograph of that pier contained in California Exhibit I, and other vessels are shown using the pier in the photograph in California Exhibit GG, under "Miscellaneous Piers." Pictures of the off-loading facilitites of the Ellwood, Rincon, and Port Orford piers are also included in this section of Exhibit GG. Tr. Denver Hearings, pp. 222-224.

[11]Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add. 1. The passage quoted by the United States at page 20 of its brief was not the language of the ILC Commentary to the final draft of Article 8, but rather of a "comment" to the 1954 draft of the article.

Louisiana, 394 U.S. 11, 50 n. 64 (1969). We hold that this paragraph means precisely what it says, and that the sixteen piers, being "permanent structures erected on the coast and jutting out to sea," are "assimilated" to harbor works, and thus to be regarded as forming part of the coast.[12] The United States disagrees, making several comments about this paragraph, and then suggesting a construction of it which it asserts would preclude the treatment of piers as parts of the coast. U.S. Brief, pp. 20-27.

First, it asserts that Article 8 of the Convention "did not break new ground, but merely codified . . ." a principle adopted in 1930 by the League of Nations Conference, which concerned ports as such.[13] It might be accurate to state this of the text of the article, were there not the ILC's Commentary and the extensive preparatory work. Certainly, the mandate of Article 8 that port facilities be treated as part of the coast falls into the category of "codification" of existing principles; nations had histori-

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[12]The Special Master specifically found that all of the piers are "permanent" facilities. Report, p. 27 n. 21.

[13]We take emphatic issue with the remarks in footnote 17, page 22 of the United States' Brief, respecting Judge Jessup's renderings of certain French texts in the ILC records and elsewhere. No evidence whatever was offered to contradict Judge Jessup's testimony. His fluency in the French language, including analysis of the French texts of opinions of the International Court of Justice, was thoroughly established. In addition, passages from the standard *Robert's French Dictionary* were introduced to corroborate his translations. Tr. N.Y. Hearings, pp. 138-143, 260-262; California Exhs. D and E. Moreover, accounts of the ILC discussions in both French and English were introduced, showing that the English word "pier" was invariably rendered "*jetée*" in French. California Exhibit D, Tr. N.Y. Hearings, pp. 138-142. Lastly, of course, the Special Master took issue with the United States, finding that the French "*jetée*" means "pier" as well as "jetty." Report, p. 27.

cally considered their port works as parts of their coasts. On the other hand, the principle that permanent coastal installations, even if not connected with a port or a harbor, likewise be treated as parts of the coast if they are not excessively long, may fall within the ILC's category of "progressive development" of international law.[14] The status of such less-prevalent structures was clearly of secondary importance to the status of port facilities; the drafters of the Convention, however, no less clearly provided that such structures were to be treated as parts of the coast, the same as port facilities.

The United States asserts that "[t[he references invoked [by California] are too equivocal to support" the conclusion that the Commentary assimilates permanent structures erected on the coast to "harbour works," U.S. Brief, p. 24.

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[14]The statute of the International Law Commission (General Assembly Resolution 174 (II), November 21, 1947), charges the Commission with the codification *and* "progressive development" of international law. In its report to the General Assembly respecting the final draft of the Convention, the Commission observed:

> "In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, *the distinction established in the statute between these two activities can hardly be maintained.* Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."

Report of the International Law Commission to the General Assembly, U.N. Doc. A/3159, *supra* note 11, para. 26, [1956] 2 Y.B. Int'l L. Comm'n 255-256. (Emphasis added.)

The references are not at all equivocal. The Commission members in 1954, 1955 and 1956 discussed lighthouses, jetties (which are often unconnected with a port or harbor), protecting dikes, and structures used for the purpose of harnessing tidal energy. Moreover, there was extensive discussion of a seven-mile-long pier in the Persian Gulf, which the Government concedes was apparently unassociated with a harbor. U.S. Brief, p. 23. The product of these discussions was the paragraph of the Commentary in question, which "assimilates" such coastal structures to harbor works. Significantly, the first draft of this paragraph read:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) *are deemed to be harbour works.*"[15] (Emphasis added.)

To make clear that the paragraph referred to coastal installations not necessarily related to a port or harbor, the words "are deemed to be" were changed to "are assimilated to" in the official draft.[16] These references could have been made less "equivocal," we submit, only had the Commission specifically discussed the California piers.[17]

Next, the Government asserts that if the Commentary were read at face value, it would have amounted to a "radi-

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[15]Draft Report of the International Law Commission Covering the Work of its 6th Session, Chapter IV, Regime of the Territorial Sea, U.N. Doc. A/CN.4/L.48/Add.4 (1954).

[16]Report of the International Law Commission to the General Assembly, 9 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 155, U.N. Doc.A/CN. 4/SER.A/1954/Add. 1.

[17]Footnote 18 on page 24 of the United States' Brief is perplexing. All of the "legislative deliberations" cited by California—the discussions of the ILC—occurred prior to the adoption of the Convention at the Geneva Conference in 1958.

cal change of view by the Commission," a "wholly new rule." U.S. Brief, pp. 23, 24. The United States is overstating the matter. It is entirely natural that the Commission "assimilated" to harbor works "permanent structures erected on the coast and jutting out to sea," even when not associated with a port or harbor, rather than treating the subject in a separate article. Sir Gerald Fitzmaurice expressed the rationale of the ILC best:

> ". . . *The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline*; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf [*i.e.*, the seven-mile pier, ought to be treated differently]." (Emphasis added.)[18]

(It was this latter concern with overly long structures which led to the third paragraph of the ILC's Commentary to Article 8, expressing caution against the use as base-points of structuress several kilometers in length. The length of the longest pier in issue is but 3500 feet. Report, p. 21.)

Too, it may be recalled that a separate article for non-port-related structures was once suggested, but that the

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[18]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER. A/1955. The italicized portion of this passage was quoted in *United States v. Louisiana, supra,* 394 U.S. at 37 n. 42.

Commission elected to treat the matter in the form of the Commentary to Article 8.[19]

The Government's suggested construction of the Commentary is then given on page 25 of its Brief:[20]

> "The location of the Comment under Article 8 can be explained as indicating the Commission's view that the coastline is affected by artificial structures jutting out to sea (as opposed to artificial landfill) only when they perform a function comparable to harbor works—such as protecting or sheltering the shore." U.S. Brief, p. 25.

But the very language of the Commentary belies the Government's suggestion. Had the Commission intended what the Government suggests, it would have written something to this effect: "Protecting or sheltering structures *only* are assimilated to harbor works." But it did not. It provided that "[p]ermanent structures erected on the coast and jutting out to sea . . . are *assimilated* to harbour works." And it gave two examples of what it meant, structures "*such as* jetties and coast protective works." Had the Commission intended the rule to be *limited* to jetties and coast protective works, "it would have done so by choice of apt words to express that intent. It did not do so. . . ." *United States v. Lexington Mill & E. Co.*, 232 U.S. 399, 410 (1914).

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[19]Summary Records of the 6th Session, [1954] 1 Y.B. Int'l L. Comm'n 88, U.N. Doc. A/CN. 4/SER. A/1954.

[20]The United States throughout its Brief incorrectly refers to the Commentary as a "Comment." "Commentary" is the appropriate term for the Commission's official remarks on the final draft of the Convention as reported to the General Assembly. The term "Comment" is used to describe such remarks accompanying earlier, working drafts of the Convention. *See* Jessup Memorandum, California Exh. C, p. 43.

II

ARTICLE 3 SIMILARLY ESTABLISHES THAT THE SIXTEEN PIERS, CONSTITUTING PORTIONS OF THE CHARTED LOW-WATER LINE, ARE PARTS OF THE COAST FOR PURPOSES OF THE SUBMERGED LANDS ACT.

While Article 8 specifically addresses the question of coastal structures jutting into the sea, Article 3, which states the rule of the "normal baseline," corroborates the conclusion that the sixteen piers are to be treated as parts of the coast. The United States presents its arguments with respect to Article 3 in sections II and VI of its Brief. U.S. Brief, pp. 11-13 and 30-33. We address the points made in both those sections of the Government's brief here.

Article 3 provides,

> "Except as otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast *as marked on large-scale charts officially recognized by the coastal State.*" (Emphasis added.)

The United States takes issue with California by asserting that the piers are not depicted as segments of the low-water line on the Government's official charts. U.S. Brief, p. 30. It acknowledges that the piers are depicted by a thin black line (an extension of the line used for all other segments of the low-water line), but asserts that this fact is insufficient to treat the piers as parts of the normal baseline within the meaning of Article 3. Several observations are pertinent.

The United States urges that piers must be connected with a harbor or constitute "coast protective works" to qualify as parts of the coast, notwithstanding that this Court has decreed as parts of the coast a number of structures, including certain jetties, having neither attribute. *United States v. California*, 432 U.S. 40 (1977); *see* note 2, *supra*. Not acknowledging that such structures are assimilated to harborworks by the terms of the Commentary to Article 8, the Government suggests instead that Article 3 "presumably was the premise" of the 1977 decree. U.S. Brief, pp. 11-12.[21] If Article 3 is in fact the basis for treating these structures as parts of the coast, it is for only one reason: they are shown as parts of "the low-water line as marked on large-scale charts officially recognized by" the United States. But as the Government concedes, the piers are shown in the identical manner.[22] If the structures referred to are parts of the coast by virtue of Article 3 then, the piers are similarly parts of the coast. If it is Article 8 that treats these jetties which serve no harbor or coast-protective function as parts of the coast, it is because they are "permanent structures erected on the coast and jutting out to sea." The piers, meeting the same criterion, must be similarly treated. But the Government cannot fight both articles. Its position "deserves the ironic tribute . . . that it works for the United States pre-

[21] Moreover, two of its witnesses testified that jetties and groins are to be treated as parts of the coast by virtue of Article 3. Deposition of Robert D. Hodgson, Defendant's Exh. U-1, p. 131, lines 1-4; testimony of Elihu Lauterpacht, Tr. N.Y. Hearings, pp. 186-187.

[22] In fact, Dr. Hodgson testified that this identical manner of depiction accounted at least in one instance for the fact that the United States has used piers as basepoints on the charts that depict its claim of territorial sea. The draftsman, he testified, assumed the pier was a jetty or breakwater. Tr. Denver Hearings, pp. 389-395.

cisely as the old game of 'heads I win, tails you lose.'" *Texas Boundary Case*, 394 U.S. 1, 9 (1969) (Black, J., dissenting).

The United States elsewhere argues that "the absence of a low-water line critically distinguishes piers [from other coastal installations] and irrevocably excludes them from consideration under Article 3." U.S. Brief, p. 12. The touchstone of Article 3 of course is not "a low-water line," but rather "the low-water line as marked on large-scale charts officially recognized by the coastal State." On the Government's charts, as we have shown, this line follows the outline of the piers into the sea. But in any event, a pier does have a low-water line—that height on its substructure reached by the sea at low water. What the Government is in fact arguing, as it did before the Special Master (Report, p. 24), is that a pier lacks a "continuous low-water line." The argument is that because a pier is a pile-supported structure, there are "gaps" in the low-water line between one piling and the next. This fact of being built upon pilings, continues the argument, disqualifies the piers from treatment as parts of the coast.[23] Again we would note, "It suffices to say that the Convention contains no such "criteri[on]." *United States v. Louisiana*, 394 U.S. 11, 41 n. 48. The remarks of the Maryland Court of Appeal, quoting from the early American case, *The Haxby*, 94 Fed. 1016 (E.D. Pa. 1899), are appropriate:

> "'The Century Dictionary defines a pier to be "a projecting quay, wharf or other landing place"; and, without some qualifying adjective, this is the ordinary

[23] A "continuous" low-water line could be effected simply by nailing planks from piling to piling at the elevation of low water.

> meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land, and for purposes of jurisdiction it should be so treated'. . . . The mere fact that these piers are built upon piles, instead of on solid ground, ought not to make any difference. They are permanent structures, and as effectively monopolize the use of the land under them as if they were built in one of the other ways mentioned in *The Haxby*." *Western Maryland T.R. Co. v. Mayor, etc. of Baltimore*, 68 Atl. 6, 10 (Md. App. 1907).

The Second Circuit has noted too:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 644 (2d Cir. 1965) (emphasis in original).

The Special Master rejected the United States' argument about the "continuous" low-water line, recognizing that this mode of construction is immaterial. For one, he noted that structures the United States calls "solid" (U.S. Brief, p. 12), such as the Long Beach breakwater, are as much as forty-five per cent water, and in this respect also lack a "continuous low-water line." Report, p. 24. Too, portions of the Zuniga jetty at San Diego are submerged, thus creating "discontinuities" in the low-water line, yet this Court has

decreed that the jetty is an artificial extension of the coast. Report, pp. 17-18; *United States v. California,* 432 U.S. 40, 41-42.

In any event, sea caves, overhanging cliffs, and the imprecision of hydrographic surveying render the notion of a truly "continuous" low-water line a myth. Testimony of William J. Herron, Tr. Denver Hearings, pp. 225-226, 271-276, 361-362. Mr. Shalowitz also provides a good exposition of the approximate and "discontinuous" nature of the low-water line. II Shalowitz, Shore and Sea Boundaries (1964), pp. 183-184, 187.

III

THE CALIFORNIA PIERS ARE VASTLY DISSIMILAR FROM THE 100-MILE-LONG OVERSEAS HIGHWAY IN FLORIDA. THE DECREE IN UNITED STATES V. FLORIDA IS HENCE INAPPOSITE.

The United States argues that treating the sixteen piers as parts of California's coast line for purposes of the Submerged Lands Act is inconsistent with this Court's decree in *United States v. Florida,* 425 U.S. 791 (1976). U.S. Brief, pp. 27-30. The argument is unsound.

In the Florida Submerged Lands Act litigation the question arose whether Florida Bay (see United States' Exhibit 23) constituted either an "historical" or "judicial" bay. (For the distinction between the two, see generally *United States v. California,* 381 U.S. 139, 172-175 (1965).) Florida Bay is bounded on the south by a series of keys connected by a causeway constituting the "Overseas Highway," U.S. Highway 1. The question was heard by Special Master Albert

B. Maris, whose report dated January 18, 1974, was excepted to by both the United States and Florida. The Court overruled Florida's exception to the recommendation that the Bay not be ruled an "historic" bay. But it referred back to the Special Master his recommendation that certain portions of the bay be recognized as a juridical bay. *United States v. Florida,* 420 U.S. 531, 533 (1975). Thereafter the parties stipulated that no inland waters exist within Florida Bay, and the Special Master in his second report dated December 30, 1975, recommended that the stipulation be approved. The parties then moved jointly for the entry of a decree approving the stipulation and the motion was granted. *United States v. Florida,* 425 U.S. 791, 793 (1976).

Thus, asserts the United States, the Court has ruled the Overseas Highway causeway not to constitute an "artificial extension of the coast." And, runs the argument, since the California piers are of open-pile construction, as is the causeway (see United States' Exhibit 14), the piers should not be regarded as artificial extensions of the coast. U.S. Brief, p. 30. The dissimilarities between the Florida causeway and the California piers, however, undo the parallel drawn by the United States.

As Judge Jessup noted upon cross-examination by Mr. Ryan, if the causeway were treated as a structure "assimilated" to Article 8 harborworks, it would effect a 100-mile artificial extension of the coast. Tr. N.Y. Hearings, pp. 104-105. Such an extension would, he observed, contravene the intent of the third paragraph of the official Commentary to Article 8. (*See* text following Note 18, *supra.*) That paragraph cautions against using as basepoints structures of

excessive length, and as Judge Jessup stated, was based upon discussion of a seven-mile-long pier in the Persian Gulf.

Another distinguishing feature is the fact that the causeway is designed to admit navigation through it at many points. Dr. Hodgson, testifying for the Government, pointed out numerous navigational channels through the causeway, circling them in red on Plaintiff's Exhibit 23. The piers on the other hand, are "built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation as if the structure had been in the first instance built on land." *Michigan Mutual Liability Co. v. Arrien, supra,* 344 F.2d 640, 644 (2d Cir. 1965). As the Special Master observed, the piers do not admit of navigation beneath their decks. Report, p. 21.

What the Government argued in *Florida* emphasizes this dissimilarity between the causeway and the piers:

> "The islands west of Knight Key cannot be considered part of the mainland . . . . As the State concedes (Br. 58), the most seaward of those islands, Key West, is over 100 highway miles from the mainland; and a water gap of more than 5 miles separates Bahia Key, the easternmost of the lower Keys, from Knight Key, the westernmost of the upper Keys. *These distances are far too great to permit the lower Florida Keys to be realistically considered part of the mainland. . . . Similarly, the water channels west of Knight Key* [through the causeway], although not deep enough to accommodate truly large vessels, *are nevertheless navigable by ocean-going fishing vessels; those channels therefore are of sufficient international*

> *significance to foreclose treatment of outlying islands as part of the mainland.*" Brief of the United States in Response to Defendant's Brief in Support of Its Exceptions to the Report of the Special Master, *United States v. Florida,* No. 52, Original, August, 1974, pp. 27-28. (Emphasis added.)

Several other points may be mentioned. While the International Law Commission on a number of occasions mentioned piers in its discussions of what became Article 8, one finds no mention of bridges or causeways. Secondly, the phrase contained in the second paragraph of the Commentary, "[p]ermanent structures erected on the coast and jutting out to sea," aptly describes the California piers; it does not, however, describe a series of bridges connecting a string of offshore islands. Tr. Denver Hearings, pp. 368-369. Thirdly, Congress has seen fit to draw a significant distinction between piers on the one hand and causeways or bridges on the other. By the Rivers and Harbors Act of 1899 it delegated to the Secretary of the Army through the Corps of Engineers the authority to permit construction of jetties, breakwaters, wharves and piers. 33 U.S.C. § 403. But it reserved to itself the power to approve construction of causeways. 33 U.S.C. § 401.[24]

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[24]The Rincon-Punta Gorda complex is truly, in the contemplation of engineering and the law, a "pier" and not a causeway; otherwise the Corps of Engineers could not have issued a permit for its construction. Tr. Denver Hearings, pp. 309-310, 330-331; *see also* Tr. Denver Hearings, p. 389, line 7 (testimony of Robert D. Hodgson). This construction by the Corps of the Act's application to the Rincon Pier is significant in determining whether "pier" or "causeway" more properly characterizes the structure. *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929).

IV

AMERICAN CASES, WHICH WITHOUT EXCEPTION TREAT PIERS AS EXTENSIONS OF THE COAST, SHOW THERE IS NOTHING ABERRANT IN THE ILC'S RULE. MOREOVER, SINCE CONGRESS CONTEMPLATED THAT DOMESTIC LAW WOULD CONTROL CONSTRUCTION OF THE SUBMERGED LANDS ACT, THERE IS NO CAUSE FOR THIS COURT TO SHUN THESE DECISIONS.

In American law, "[f]rom time immemorial piers, docks, wharves and other like structures, which are firmly attached to the land and extend over navigable waters, have been deemed to be extensions of the land . . ." *East v. Oosting*, 245 F.Supp. 51, 53-54 (E.D. Va. 1965). In its Brief, at pages 38-40, the United States mischaracterizes California's citation to the unbroken line of domestic admiralty cases holding that piers are extensions of the land. *See* California Brief, pp. 41-42. We recognize that the Convention has been adopted to provide definitions for the Submerged Lands Act; otherwise we would not stress the fact that Articles 3 and 8 of the Convention treat the sixteen piers as forming parts of the coast. But the American cases are useful to show there is nothing strange or esoteric in what one ILC member called "[t]he Commission's rule that jetties and piers be treated as part of the coastline . . . ."[25] (This remark was quoted by this Court

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[25]See note 18, *supra*, and accompanying text. *P.C. Pfeiffer Co., Inc. v. Ford*, ... U.S. ...., 100 S.Ct. 328 (1979), does not affect this Court's rule that piers are extensions of the land. *See Nacirema Co. v. Johnson*, 396 U.S. 212 (1969). *Pfeiffer* merely reflects the fact that Congress has extended the coverage for injuries to longshoremen and harbor workers. Formerly the worker was covered only if the injury occurred on navigable waters; he is presently covered even if the injury occurs on certain land facilities "adjoining" navigable waters, e.g., piers. *Id.* at 332-333.

in *United States v. Louisiana*, 394 U.S. at 37 n. 42.)

Moreover, as we have shown, Congress plainly contemplated that questions of construction of the Submerged Lands Act would be controlled not by international law but by domestic law. California Brief, pp. 38-41. It might be added that seven years later, when the Convention was before the Senate for its advice and consent, Government witnesses again stressed that nothing in those principles of international law would prejudice the rights of the States under the Submerged Lands Act.[26] In this light, we see no reason that this Court must ignore the teachings of our domestic jurisprudence.

V

EVEN IF THIS COURT WERE TO EMPLOY THE TEST ADOPTED BY THE SPECIAL MASTER AND THE UNITED STATES, THE PIERS UNQUESTIONABLY CREATE AN "INTEREST IN THE SURROUNDING WATERS THAT WOULD OTHERWISE NOT EXIST."

The Special Master recommended that the status of the sixteen piers as parts of the coast be determined by applying the "particular interest" test suggested by authors McDougal and Burke, The Public Order of the Oceans (1962), pp. 387-88. Report, pp. 26-27. The United States also urges adoption of this test. U.S. Brief, pp. 33-37. We stress again that the criterion of the Convention is unam-

[26] Hearing before the Committee on Foreign Relations, United States Senate, on Executives J, K, L, M, and N, 86th Congress, 2d Session (1960), pp. 19-20.

biguous: "[p]ermanent structures erected on the coast and jutting out to sea . . . ." Of the appropriateness of the McDougal and Burke test, therefore, it should suffice once again to note that "the Convention contains no such criteria." *United States v. Louisiana,* 394 U.S. at 41 fn. 48. We shall reply, nevertheless, to the remarks made by the Government.

The United States, it should first be mentioned, ignores the fact that the "interest" test was formulated by its authors not to determine the status of structures erected on the coast, such as piers, but to determine whether artificial islands unconnected with the coast ought to be used for delimiting the territorial sea. McDougal and Burke, pp. 387-88. Contrary to the Government's assertion (U.S. Brief, p. 35), the test is plainly a departure from principles of international law, for Article 10 of the Convention prohibits the use of artificial islands as basepoints.[27]

Second, the Special Master and the United States cite only the "policy issue" suggested by the authors, but not the authors' "*chief* criterion":

> "The chief criterion for appraising the reasonableness of a claim to delimit the territorial sea, or of an area of internal waters, from an artificially formed area of land surrounded by water, is whether it is constructed for practical use or rather only as a dis-

[27]The United States is correct (U.S. Brief, pp. 34-35) that California had called to the attention of the Special Master the passage in question. Both parties in fact made reference to the work of McDougal and Burke in their review of the literature. *See,* e.g., United States Exhibit 12, p. 35. Neither the Special Master, however, nor either of the parties noticed that the authors' suggested criterion was designed not for application to structures erected on the coast, but to artificial islands offshore. We regret the oversight.

> guised attempt to extend the territorial sea or internal waters without other relation to local interest." McDougal and Burke, pp. 387-88.

None of the piers in issue was built as a "disguised attempt to extend the territorial sea," or the lands confirmed in California by the Submerged Lands Act. All were built for "practical use": for ports, for energy production, for fishing, and for recreation.

Third, the United States notes (U.S. Brief, p. 33) that the Special Master resorted to the McDougal and Burke criterion only after concluding that "the drafters of the Geneva Convention . . . simply did not think of or consider the question of artificial piers . . . ." Report, p. 28. But the Master's statement is demonstrably incorrect, as shown by the Commission members' extensive discussion of the seven-mile pier in the Persian Gulf. *See* California Brief, pp. 24-27. Moreover, Sir Gerald Fitzmaurice of the United Kingdom in 1955 and again in 1956 made reference to "[t]he Commission's *rule* that jetties *and piers* be treated as part of the coastline . . . ."[28] (Emphasis added.) Even had there not been these express references to piers, however, the ILC's criterion unquestionably applies to the California piers: "Permanent structures erected on the coast and jutting out to sea . . . ."

But even if we assume that the question had been left open by the ILC, and that resort to the McDougal and Burke criterion were appropriate, it is plain that the six-

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[28]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN. 4/SER. A/1955; Summary Records of the 8th Session, [1956] 1 Y.B. Int'l L. Comm'n 193, U.N. Doc. A/CN. 4/SER. A/1956.

teen piers create an "interest in the surrounding waters that would otherwise not exist . . . ." The Special Master focused on two interests only of the coastal nation, those created by harbors and those by "coastal maintenance" facilities. Report, p. 29. But the authors whose test the Master adopted did not so limit the kinds of "interest" they meant. Chapter 1 of their work deals extensively with those interests, which to abbreviate a lengthy discussion are, broadly, four: Power (e.g., defense facilities), wealth (e.g., commerce facilities), well-being, and enlightenment (e.g., ocean-research facilities). McDougal and Burke, pp. 9-10. In this light, it cannot be said that the sixteen piers do not create a "particular interest in the surrounding waters that would otherwise not exist." As we have emphasized, five of the piers were specifically found to meet the definition of a port. Report, pp. 7, fn. 7, 20-21. Producing oil wells are situated on two of the piers, the Rincon (Report, p. 20) and the Ellwood (see photographs in California Exhibit I). The national policy recognizing coastal recreation facilities as important to our nation's well-being certainly invests those piers which serve primarily recreational purposes with an interest "that would otherwise not exist."[29] The ready adaptability of the piers to changing conditions, demonstrated by the conversion of two recreational piers to ferry terminals in the wake of a massive landslide,[30] further illustrates the interests generated by these piers.

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[29]*See* California Brief, p. 37; Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

[30]California Brief, p. 11, fn. 21.

Lastly, recent events in the Middle East have recalled to our Country's awareness what is any nation's most vital interest, security. During World War II (and one may assume that similar, secret contingency plans exist today), all of the piers on the California coast were seized by our armed forces. Some were used as transfer points for vessels patrolling the Pacific coast; the others were held under guard to prevent their use by enemy vessels.[31]

We would suggest again that if this Court finds it appropriate to resort to the writings of commentators, the three State Department publications expressing the view that piers constitute parts of the coastline should be consulted. See California Brief, pp. 42-43. (A diagram from the 1965 and 1969 publications, showing a pier unconnected with a port or harbor and used for delimiting the territorial sea, is reproduced on page 51 of Californa's Petition for a Fourth Supplemental Decree.) The United States makes no comment on these publications in its Brief.

[31]Tr. Denver Hearings, pp. 303-304.

CONCLUSION

We submit that the United States has advanced no cogent reason to disqualify the sixteen piers as artificial extensions of California's coastline. The piers squarely meet the criteria of the Convention. Moreover, even employing the test recommended by the Special Master and the United States, they unquestionably create a "particular interest in the surrounding waters that would otherwise not exist . . . ." For the reasons brief herein and in our opening brief, we respectfully request that this Court enter its Supplemental Decree in the form proposed by California in its Petition for a Fourth Supplemental Decree.

February 14, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 5 Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF CALIFORNIA TO THE REPORT OF THE SPECIAL MASTER DATED AUGUST 20, 1979

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AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF CALIFORNIA TO THE REPORT OF THE SPECIAL MASTER DATED AUGUST 20, 1979

The United States of America recently brought suit under this Court's original jurisdiction to determine the boundary between submerged lands quitclaimed by the United States to the State of Alaska as an incident of Statehood under the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., and the lands of the outer continental shelf which remain under the control of the United States. *United States* v. *Alaska*, No. 84 Original. While that case, as presently pleaded, is confined to a determination of the common boundary in a portion of the Beaufort Sea, it is anticipated that, as with other submerged lands litigation, it eventually will be the forum for resolution of all remaining disputes involving Alaska's seaward boundary.[1]

While most of Alaska's coastline remains in its undeveloped natural state, there has been some development of piers, jetties and other coastal installations. In his Report of August 20, 1979 in this case, Special Master Alfred J. Arraj made recommendations to this Court regarding the legal effect this Court should give to such

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[1] One dispute concerning the seaward boundaries of Alaska's submerged lands has been before this Court. United States v. Alaska, 422 U.S. 184 (1975). That case was not brought under this Court's original jurisdiction; it was filed in the United States District Court for the District of Alaska and came to this Court on a writ of certiorari. For cases representative of other original jurisdiction submerged lands litigation, *see* United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960); United States v. California, 381 U.S. 139 (1965); and United States v. Louisiana, 394 U.S. 11 (1969).

structures in ascertaining California's seaward boundary. His recommendation that the 16 piers and wharves on the California coast should not be treated as "artificial extentions" of California's coastline is the product of a serious misapprehension of the law and departs from principles already established by this Court. If adopted by this Court, the Special Master's recommendation might establish principles that would incidentally deprive Alaska of submerged lands as to which Alaska's ownership heretofore has not been questioned. Those submerged lands lie within a boundary generated by treating permanent installations (in the nature of the California piers) as part of Alaska's coastline. Accordingly, the Court's decision in this case is of vital concern to Alaska.

The Special Master departed from principles already established by this Court when he adopted, Report, pp. 28-29, a "balancing test" under which the effect of artificial structures on delimitation of the coastline is determined by ascertaining "'whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased. . . .'" Report, pp. 26-27, quoting from McDougal and Burke, *The Public Order of the Oceans* at 387-388 (1962). As applied by the Special Master, *see* Report, pp. 28-29, it would appear that only harbor works connected with a conventional harbor or artificial structures serving a coastal maintenance function would create a sufficient interest in the surrounding waters to justify treating the structures as modifications of the coast.

However, such determinations are to be made in accord with the principles established by the Geneva Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606 (1964). *See United States* v. *California*, 381 U.S. 139, (1965): *United States* v. *Louisiana*, 394 U.S. 11, 16, 34 (1969). In the 1965 *California* decision, 381 U.S. at 175, the Court adopted the

language of Article 8 of the Convention that "the outermost permanent harbor works which form an integral part of the harbor system shall be regarded as forming part of the coast" as determinative under the Submerged Lands Act. In the *Louisiana* decision, 394 U.S. at 50 n. 64, the Court called attention to the second paragraph of the official Commentary to the final International Law Commission draft of Article 8 (identical to its present form) which provides:

> (2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbor works.

[1956] 2.Y.B. Int'l. L. Comm'n. 270. The Court noted that the Commentary "expressly covers artificial structures which are not closely linked to ports" in rejecting the United States' restrictive position that Article 8 is limited to structures which are "integral parts of [a] harbor system". The Court held that beach erosion jetties, sometimes called "groins," which are not directly connected with a port are part of the coast within Article 8 of the Convention.

Moreover, this Court has held a number of other structures having various purposes to be "artificial extensions" of the coastline. *United States* v. *California*, 432 U.S. 40, 41-42 (1977). Only a few of the structures addressed in the 1977 *California* decree have any connection with a port or harbor. Several others are examples of "coast protective works," but still others are neither works associated with a port or harbor nor coast protective works. The Agua Hedionda Lagoon Jetties, for example, are simply designed to provide an intake for a lagoon which supplies cooling waters for an electrical power plant at the site. Transcript of Denver hearings before the Special Master, *United States* v. *California*, pp. 220-234.

From the foregoing, it is clear that installations which this Court has decreed to be artificial extensions of the coastline may have various purposes and need not be structures which either are connected with a conventional harbor or serve a coastal maintenance function. The determinative factor is whether they are "permanent structures erected on the coast and jutting out to sea. . . ." The 16 California piers all meet these criteria, and therefore are artificial extensions of the coastline.

The most notable error in the Special Master's recommendation was his treatment of those piers on the California coast which are used by oil companies for the loading and unloading of passengers and cargo (the Port Orford, Ellwood, Carpinteria, Morro Strand and the Rincon Island-Punta Gorda Piers). These installations are not only "permanent structures erected on the coast and jutting out to sea. . .;" they also constitute port facilities[2], and the history of and commentary to Article 8 have made it clear for some time that it encompasses port facilities such as the five California piers referred to above.

When the text of the Convention was referred to the General Assembly by the International Law Commission in 1956, Article 8 was entitled "Ports." Paragraph 1 of the Commentary to Article 8 provides in part:

> (1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State.

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[2] Alaska is in basic agreement with these definitions employed by the Special Master:

> A port is any place where passengers or cargo may be tranferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe anchorage and sheltering for boats from weather conditions prevailing on the open sea.

Report, p. 7 n. 7.

[1956] II Y.B. Int. L. Comm'n. p. 270. When the Court adopted the language of Article 8 as determinative under the Submerged Lands Act in the 1965 *California* decision, 381 U.S. at 175, it was established that port facilities such as the five California piers referred to above are parts of the coastline for purposes of the Act. There was no reason for the Special Master to go beyond that decision and the provisions of the Geneva Convention, apply a "balancing test" that has not received the sanction of this Court and conclude that these five piers—i.e., port facilities—should not be considered part of the California coast.

Particular attention should be given to the Rincon Island-Punta Gorda facility. This installation should not be confused with an artificial island, the use of which for measuring the territorial sea is prohibited by Article 10 of the Convention. The facility is a port installation which is connected to the mainland by a pier. Report, p. 29. Unlike artificial islands, the Rincon Island-Punta Gorda facility meets the requirement that it be "connected with the coast." *United States* v. *Louisiana*, *supra* at 37. It is significant that, in that decision, this Court noted that raised structures, such as lighthouses, would be considered "harbor works" if they were connected with the coast, and therefore would be used as base points pursuant to Article 8, while such structures would constitute artificial islands which would not be used as base points by virtue of Article 10 in the absence of such a connection.

The Special Master referred to the McDougal and Burke approach as a "reasonableness test." Report, p. 28. However, there is nothing reasonable about a test under which a rubble groin supporting no human activity but merely serving to minimize beach erosion creates a greater "interest in the surrounding waters" than a pier which may serve as a port or as a place where people may stroll,

fish, and dine in ocean-view restaurants. In any event, if the McDougal and Burke test produces a result different from the results obtained by applying this Court's decisions and the provisions of the Geneva Convention, its use is impermissible; that is precisely the result here.

The writings of one commentator, however, are noteworthy. Dr. G. Etzel Pearcy, the former Geographer of the Department of State, held the view that "[p]iers and breakwaters are the most common examples" of permanent installations which form parts of the coast. Pearcy, "Measurement of the U.S. Territorial Sea," XL *Bulletin*, Department of State No. 1044, June 29, 1959, pp. 963, 966-968, quoted in 4 Whiteman, *Digest of International Law* (1965) p. 263. In Dr. Pearcy's 1965 "Sovereignty of the Sea" article, Department of State Geographic Bulletin No. 3, there is a diagram showing a "pier," unconnected with any port or harbor, used as a base point for measuring the territorial sea. *Id.* at 29. (That article was cited by this Court in *United States* v. *Louisiana*, *supra* at 51 n. 66.) The identical diagram was included as part of Dr. Pearcy's 1969 article published in the Department of State Bulletin at p. 31. While these writings contained disclaimers that they do not necessarily reflect the policies of the Department of State, it is significant that the 1965 diagram was unchanged when it was republished in 1969.

For the foregoing reasons, the recommendation of the Special Master with respect to the 16 piers along the California coast should not be adopted by this Court. Rather, this Court should enter a decree declaring that those 16 piers constitute artificial extensions of the California coastline and are to be employed in determining the boundary between submerged lands quitclaimed to the

State of California under the Submerged Lands Act and submerged lands of the outer continental shelf under the control of the United States.

DATED: November 14, 1979

Respectfully submitted,

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UNITED STATES — GULF COAST

FLORIDA

FLORIDA KEYS

ALLIGATOR REEF TO SOMBRERO KEY

Mercator Projection

SOUNDINGS IN FEET
AT MEAN LOW WATER

F L O R I D A B A Y

S T R A I T S O F F L O R I D

Middle Cape

East Cape

Christian Pt.

Shark Pt.

Mosquito Pt.

Madeira Bay

Lower Matecumbe Key

Long Key

Alligator Reef

Sombrero Key

INTRACOASTAL WATERWAY

CAUTION

THIS DOCUMENT IS NOT FOR USE IN NAVIGATION

The lines drawn on this document delimit provisionally the territorial sea, contiguous zone, and certain internal waters of the United States. They have been prepared by an interdepartmental committee and represent its interpretation of relevant legal principles as applied to the geographical information shown on a Coast and Geodetic Survey nautical chart which has been used as a base. These lines are subject to revision whenever it is required by amplification or correction of the information shown on the chart or by reinterpretation of the legal principles involved. This document does not attempt to delineate international boundaries and is not to be understood as asserting or implying where they are located.

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